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In The

Supreme Court of the United States

DAVE DAHLGREN; DAHLGREN'S, INC.; THEODORE COLLIN; DIXON GRANSTRA d/b/a GRANSTRA CATTLE; DG FARMS, INC.; WELLS AG ENTERPRISES, INC.; DON SJOGREN; BJW FARMS, INC.; EWW FARMS, INC.; and DWAYNE KUDLACEK,

Petitioners,

v.

FIRST NATIONAL BANK OF HOLDREGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a bank that for its own benefit actively assists in carrying out a fraudulent scheme involving its customer, a RICO enterprise, "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs?"

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

Parties to the proceeding in the United States Court of Appeals for the Eighth Circuit were:

Appellees: Dave Dahlgren; Dahlgren's, Inc.; Theodore Collin; Lloyd Erickson; Erickson Land and Cattle; Dixon Granstra doing business as Granstra Cattle; DG Farms, Inc.; Skane, Inc.; Clark Nelson; Wells Ag Enterprises, Inc.; Don Sjogren; BJW Farms, Inc.; EWW Farms, Inc.; and Dwayne Kudlacek.

Appellant: First National Bank of Holdrege, Nebraska.

Appellees below Lloyd Erickson; Erickson Land and Cattle; Skane, Inc.; and Clark Nelson, who are represented by Petitioners' counsel, are not participating in this petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the stock of any of the corporate Petitioners: Dahlgren's Inc.; DG Farms, Inc.; Wells Ag Enterprises, Inc.; BJW Farms, Inc.; or EWW Farms, Inc.

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Opinion of the United States Court of Appeals for the Eighth Circuit: *Dahlgren v. First National Bank of Holdrege,* 533 F.3d 681, RICO Bus. Disp. Guide 11,532 (8th Cir. 2008), *rehearing and rehearing en banc denied.*

Order of the District Court for the District of Nebraska on motion for treble damages and attorneys' fees: *Dahlgren v. First National Bank of Holdrege*, 2007 WL 397009, RICO Bus. Disp. Guide 11,225 (D. Neb. 2007).

Order of the District Court for the District of Nebraska on motions at pretrial conference: *Dahlgren v. First National Bank of Holdrege,* 2006 WL 5186536 (D. Neb. 2006).

BASIS FOR JURISDICTION

Date the judgment sought to be reviewed was entered: July 11, 2008.

Date of the Eighth Circuit order denying rehearing: August 22, 2008.

Statutory provision conferring jurisdiction to review judgment on a writ of certiorari: 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

Petitioners' Basis of Federal Jurisdiction

Petitioners commenced this action in the District Court of Phelps County, Nebraska. The First National Bank of Holdrege removed it to the United States District Court for the District of Nebraska under 28 U.S.C. § 1441(b). Because the action includes a claim under 18 U.S.C. § 1964(c), the federal district court had jurisdiction pursuant to 28 U.S.C. § 1331.

Nature of the Case

Petitioners are farmers and cattlemen who did business at Damrow Cattle Company ("DCC"), a commercial cattle feedlot, until it was put into receivership in January 2001. (App. 1-4). All of the Petitioners except Dixon Granstra d/b/a Granstra Cattle Company and DG Farms, Inc. ("the Granstras") were also customers of Respondent First National Bank of Holdrege ("FNBH"). FNBH was DCC's bank from 1983 until April 2000 and DCC was one of FNBH's largest customers. (App. 2). During that time, each Petitioner asked FNBH whether DCC was in satisfactory financial condition, and FNBH always responded that DCC had no financial problems, which was untrue. In addition, FNBH cleared many mailed checks and interstate wire transfers to the Petitioners on DCC's accounts when DCC was overdrawn and had no room on its line of credit, lulling the Petitioners into a false sense of security about DCC's finances.

In April 2000, First National Bank of Omaha ("FNB-Omaha") replaced FNBH as DCC's primary lender. Not quite nine months later, FNB-Omaha put DCC into receivership and seized DCC's assets, asserting ownership of all cattle and grain at DCC. Ultimately, Petitioners were not able to defeat FNB-Omaha's liens on their grain and lost the grain's entire value. Petitioners also lost all or part of the value of cattle they had at DCC in litigation with FNB-Omaha. (App. 1-2).

In this action, Petitioners claimed FNBH violated the Racketeer Influenced and Corrupt Organizations Act ("RICO")[1] by associating with DCC as a RICO enterprise proximately causing Petitioners' losses. After a four-week trial, the jury returned verdicts for the Petitioners on all claims. Although the jury had been correctly instructed concerning the operation or management test, the Eighth Circuit reversed, concluding as a matter of law that Petitioners had failed to demonstrate FNBH's control of DCC's affairs.[2] (App. 8-15). The Eighth Circuit also denied further review *en banc* or by the panel. (App. 50).

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[1] And Nebraska law.

[2] The Eighth Circuit also reversed verdicts on Petitioners' state law claims.

Factual Background

A. FNBH's Acquisition of Power over DCC, the RICO Enterprise.

On June 6, 1994, Dennis Damrow ("Damrow"), who partly owned and managed DCC, learned that DCC's and Carter Feeders, Inc.'s ("Carter") customer John Morken was about to declare bankruptcy. (App. 12). Morken and an entity he owned, Spring Grove Livestock, had financed their cattle feeding at DCC and Carter, another feedlot partially owned and managed by Damrow and financed by FNBH, through DCC's and Carter's financing companies, DFF, Inc. and CFF, Inc. respectively. (App. 12).[3]

Damrow asked FNBH President Kenneth Slominski for help because he was concerned about Morken paying outstanding feed bills at DCC and Carter. At that time, FNBH had about $5,200,000 advanced to DFF and CFF on Morken's notes financing his cattle at the two feedlots. (App. 12). In a lengthy conference call with FNBH's lawyer, Thomas Ashby, Damrow, Slominski, and FNBH's senior loan officer formulated a plan for dealing with the Morken bankruptcy. Damrow erroneously believed Ashby was also representing

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[3] Cattle investors could make down payments to the feedlots for cattle they purchased and finance the remainder of the purchase price, feed costs, and other expenses through DFF and CFF by signing promissory notes. The financing companies assigned the investors' notes to FNBH, which booked DFF or CFF loans in the same amount, with the assigned notes and cattle as security. (App. 3).

the feedlots and did exactly as Ashby advised. (App. 12).

Slominski notified Morken that FNBH was foreclosing on his cattle and directed Damrow to find someone to buy the cattle for the amount that was owing to FNBH on Morken's CFF and DFF notes. (App. 12-13). Because some of the cattle that FNBH was selling had already been sold to meatpackers and cattle prices were plummeting, any such buyer would take substantial losses.

To satisfy FNBH, Carter committed to buy the Morken cattle at Carter's lot, including cattle that had already been shipped to meatpackers. FNBH agreed to loan Carter the purchase price, and Carter used those funds to repay CFF notes on Morken cattle to FNBH.

DCC could not borrow from FNBH to buy the cattle at its lot because DCC was at FNBH's legal lending limit. After Damrow convinced an associate to buy some of these cattle, DFF still owed FNBH $1,180,000 on Morken cattle at DCC. To circumvent FNBH's lending limit to DCC, FNBH made a nominee loan to DCC in Carter's name: FNBH loaned Carter $3,000,000, out of which Carter loaned DCC $1,180,000 to buy Morken cattle and pay off DFF's remaining Morken debt to FNBH.

FNBH denied making the illegal nominee loan, but the evidence established the loan existed. Slominski refused to answer questions about other nominee loans FNBH had made to avoid banking

regulations and whether FNBH had a practice of making such loans on the basis the answers might incriminate him, permitting an inference that FNBH had a practice of making these loans, and Damrow was convicted of bank fraud for conspiring with FNBH in the Morken transactions.

By obeying FNBH's directives to buy the Morken cattle, DCC and Carter sustained large losses. If DCC had refused FNBH's demands, it would not have suffered significant loss in Morken's bankruptcy. FNBH's borrower on the Morken notes was DFF. DFF was a pass-through entity without assets, and DCC did not guarantee DFF's indebtedness. If DFF had defaulted, FNBH would have borne the loss. Instead, FNBH forced DCC to swallow FNBH's losses.

FNBH soon discovered it did not have perfected security interests in Morken's cattle, jeopardizing its foreclosure. FNBH did, however, have perfected security interests in Morken-controlled Spring Grove Livestock's cattle. FNBH's president and counsel arranged to use DCC's typewriter on which the original Morken notes had been typed in order to alter the notes and make them appear as if Morken had signed them as Spring Grove's agent.

Although the note alterations were not disclosed in FNBH's filings with the Minnesota bankruptcy court adjudicating Morken's and Spring Grove's bankruptcies, the debtors' bankruptcy trustees discovered the alterations and moved to set aside FNBH's foreclosure. Ultimately, settlement negotiations occurred on the

trustees' claims against FNBH, Carter, and DCC. FNBH insisted on settling the case and told Damrow that if he would not go along FNBH would pull DCC's and Carter's financing, but if he cooperated FNBH would loan them their shares of the settlements and stand behind them if they encountered problems repaying these loans.[4] (App. 13-15). Damrow agreed to settle, costing DCC around $700,000.

B. FNBH's Participation in the Conduct of DCC's Affairs.

Although the Morken bankruptcy left DCC in serious financial difficulty, DCC paid Slominski $18,000 in the three years following the Morken settlement. Slominski alleged these payments were his share of hedge account profits, but he never put up money to purchase the investment, never had a loss or responded to a margin call, and never owned any cattle to hedge.

During this period, DCC struggled to pay DFF's and its own notes. Rather than paying DFF's notes on time, DCC used its customers' cattle sales proceeds to finance its operations. (App. 11-12). Damrow paid cattle investors their shares of profits so they never became aware they remained obligated to FNBH on their assigned DFF notes. FNBH knew when the

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[4] Damrow was also given the misimpression that DCC and Carter would be facing $8,000,000 to $9,000,000 in preference claims if he did not settle. (App. 14 n.5).

cattle had been sold because the packer checks were made jointly payable to it, mailed to it, and FNBH's clerks referenced cattle lot numbers on DCC's deposit slips. FNBH also monitored when DCC paid investors their profits, yet never informed these investors that their notes remained unpaid. FNBH did not merely countenance DCC's improper use of DFF to fund DCC; FNBH assured the practice by refusing to let DCC pay DFF's notes whenever DCC had borrowed more than its lending limit. In effect, FNBH made nominee loans to DCC through DFF to get around regulatory requirements. (App. 11-12).

FNBH also routinely allowed DCC and DFF to maintain overdrawn balances – sometimes as high as $1,100,000 – for extended periods. During these periods, FNBH made only a few advances from DCC's line of credit that were too small to cover the overdrafts, because DCC had already borrowed its maximum. (App. 4, 11-12). Although DFF was a pass-through account – *i.e.*, DFF was only supposed to write checks after it had received checks in the same amount from DCC or FNBH so DFF should never have had an overdraft balance – FNBH allowed DFF to have substantial overdrafts as another way to funnel operating funds to DCC while appearing to stay within regulatory lending limits. (App. 4).

FNBH manipulated DCC's records in other ways: 1) FNBH made DCC and Carter remove inter-company loans from their financial statements before it would renew their lines of credit; 2) FNBH increased DCC's feeder cattle values on a trend-line

statement by $2,000,000, allowing FNBH to loan DCC more money because of higher lending limits on cattle loans; and 3) DCC's loan officer made unauthorized transfers from DCC's account to cover Carter overdrafts. (App. 11-12).

C. The OCC's Action Against FNBH.

On September 12, 1997, the Office of the Comptroller of Currency ("OCC") placed FNBH under a Formal Agreement. (App. 5-6). The Agreement required FNBH to replace its senior lending officer and hire an outside consultant to analyze lending problems and President Slominski's performance. FNBH had to adopt a program for eliminating classified assets, and renewal of classified loans was severely restricted. FNBH reduced agricultural loans from $100,000,000 to $40,000,000 while under the Formal Agreement. In January 1998, FNBH hired Kirk Riley as its new senior lending officer with responsibility for insuring FNBH's compliance with the Formal Agreement, and he became president when Slominski resigned a few months later. (*Id.*)

D. Carter Shareholders' Discovery Starts to Unravel the Scheme.

In the fall of 1999, Carter's shareholders besides Damrow notified FNBH that they suspected Damrow had submitted false financial statements to FNBH. (App. 6). New Carter financial statements submitted in October showed large grain and cattle inventory

shortages, which caused FNBH to sweep $400,000 from Carter's checking account to bring Carter in compliance with FNBH's legal lending limit.

By November of 1999, FNBH had placed DCC on its classified asset list. An inspection was scheduled for February, which FNBH intended to review before considering renewal of DCC's loan in March 2000 because renewal of DCC's classified loan was restricted by the OCC's Formal Agreement. In January, Damrow admitted to his new FNBH loan officer that he had submitted inaccurate Carter financial statements "from day one" without the other shareholders' knowledge; she reported this to FNBH's new management. (App. 6). Without waiting for the February inspection, FNBH's Board of Directors decided that DCC should find another bank. The next day without informing Damrow of its decision, FNBH convinced Damrow to sign a deed of trust on DCC's property for no consideration because FNBH had realized it had no lien on DCC's real estate. (App. 6). Eight days later, FNBH informed Damrow he had to find a new lender. FNBH's OCC-required "written plan" for dealing with DCC's classified loan became "have Damrows refinance outside of bank. . . ."

E. FNBH's Fraud to Rid Itself of DCC's Classified Loan in Order to Comply with the Formal Agreement.

When FNBH told DCC to leave, it suggested FNB-Omaha as DCC's new lender, and soon began

working with FNB-Omaha to have it take over DCC's line. (App. 7). FNB-Omaha asked Adams Bank to participate with it in the DCC credit.

Most of FNB-Omaha's information about DCC came from FNBH. FNBH withheld vital information about DCC during FNB-Omaha's due diligence investigation. FNBH also failed to give accurate information to Pathfinder, FNB-Omaha's inspection agent. In February 2000, a Pathfinder inspection of DCC was scheduled, following up on December's inspection that showed insufficient collateral for DCC's loan. Before the inspection, Damrow asked FNBH how he might claim Carter receivables on DCC's financial statement, even though Pathfinder had already disallowed them as uncollectible. Sensing that FNB-Omaha would not approve DCC's loan without an increase in margin, Damrow ultimately disguised the Carter receivables as inventories on DCC's balance sheet: an action he believed FNBH approved.

Within nine months after assuming DCC's credit, FNB-Omaha placed DCC in receivership. FNB-Omaha and Adams Bank later sued FNBH, alleging it had defrauded them into taking over DCC's loan. FNB-Omaha settled its lawsuit with FNBH in 2004, and Adams Bank settled during trial of the instant matter. (App. 32).

F. FNBH's RICO Scheme.

After FNBH took advantage of DCC in the Morken bankruptcy, making it dependent on the

bank, FNBH engaged in a scheme to defraud Petitioners involving use of the mail and interstate wires. FNBH's scheme was to prop DCC up and keep it operating by deceiving the Petitioners about DCC's finances in order to induce Petitioners to continue delivering corn and feeding cattle at DCC. FNBH's motives were its own financial gain, and keeping Damrow quiet about the Morken transactions and DCC's payments to Slominski. Later FNBH's motive was to prevent FNB-Omaha and Adams Bank from discovering that they had been deceived into taking over DCC's loans.

Petitioners received numerous n.s.f. checks in the mail from DCC, which FNBH covered when DCC had already borrowed the maximum on its line of credit. Similarly, FNBH also wired funds to the Granstra Petitioners, Dixon Granstra and DG Farms, in Iowa when DCC had no money or credit. These mailings and interstate wires furthered FNBH's fraudulent scheme by lulling Petitioners into believing that DCC was in good financial shape. An FNBH officer also made false assurances to the Granstras' banker about DCC's financial strength in two interstate phone calls.

G. Lying to the Petitioners to Further FNBH's Fraudulent RICO Scheme.[5]

a. The Granstras. In June of 1999 and in another call, the Granstras' banker asked FNBH about DCC and FNBH's loan officer falsely stated DCC was in excellent financial condition. (App. 25-27). The FNBH officer also promised to call the Granstras' banker if DCC's financial condition changed. FNBH put DCC on its watch list the week after the bankers' phone call, and classified DCC's credit in November, yet FNBH never called the Granstras' banker back. (App. 25-27).

b. Donald Sjogren. After Sjogren received a returned n.s.f. check on DCC's account, FNBH misrepresented DCC's financial health to Sjogren when he went to the bank, later calling to smooth things over. The next day, FNBH put DCC on its watch list. Still later FNBH invited Sjogren to golf with FNBH's president and Damrow to cement Sjogren's false impression of DCC's financial strength. (App. 27-29).

c. Theodore Collin. Collin worked at FNBH from 1983 until 2000. He was also a farmer. After 1998, he was not on the loan committee and was not

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[5] FNBH was also found liable under Nebraska law for misrepresentations to Harold Erickson (Skane, Inc.), Chris Erickson, Lloyd Erickson (Erickson Land and Cattle Co.) and Clark Nelson, which the Eighth Circuit affirmed, primarily because of false statements made by FNBH loan officer Eric Titus to these parties. (App. 15-32). They do not join in this Petition.

aware of most of DCC's financial problems. Although he heard that DCC had overdrafts and some past due notes, FNBH, who knew Collin was a DCC customer, explained these irregularities away. Collin trusted FNBH to not mislead him and believed FNBH would tell him if he needed to worry about DCC.

Collin relayed FNBH's false statements about DCC's financial well-being to his own FNBH loan customers, telling them that DCC was safe. FNBH's comments also led Collin to continue bringing his own corn to DCC and to feed cattle there, even recommending that a later employer fund a loan for DFF. (App. 29-31).

d. David Dahlgren and Dahlgren's Inc. Dahlgren was Collin's FNBH customer. Dahlgren and his family corporation, Dahlgren's Inc., could not afford much risk, so during yearly meetings with his loan officer he always asked whether it was advisable to do business with DCC and relied on FNBH's answer in deciding whether to feed cattle at DCC. FNBH officer Collin, lacking his superiors' knowledge of DCC's financial problems, told Dahlgren DCC was okay so Dahlgren continued to do his personal and corporate business at DCC. (App. 31-32).

e. Gary Wells, Robert Wells, Dwayne Kudlacek. Gary Wells operates Wells Ag Enterprises, Inc. and Robert Wells operates BJW, Inc. They both manage EWW, Inc. For years, FNBH officers falsely misrepresented DCC's financial status as "okay" to the Wellses, leading them to continue business with

DCC. In August 2000, FNBH loan officer Eric Titus responded to Gary Wells's question whether DCC was a safe place to do business by telling Wells that he was planning to deliver his own corn there. As their loan officer, Titus knew Gary Wells was Robert Wells's brother and their brother-in-law was Dwayne Kudlacek. Gary Wells relayed Titus's statement to Robert Wells and Kudlacek and all three relied on Titus's statements in delivering 2000 crops to DCC. Titus, on the other hand, neither delivered corn nor fed any cattle at DCC in 2000; he lost nothing when DCC failed, which he described as "extremely lucky." (App. 24-25).

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States should review this case to resolve conflicts and confusion among the courts of appeals regarding the operation or management test adopted in *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993).

As will be discussed *infra*, review of *Reves* is important because some courts view it as a *per se* exclusion for outsider liability, an interpretation not justified by the RICO statute. Such restrictive rulings have the potential for squelching RICO's punishment of white-collar crime contrary to the intent of Congress.

DISCUSSION

In *Reves,* the Court was asked to determine the meaning of "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" in 18 U.S.C. § 1962(c). The Court examined the terms "conduct," both as a noun and verb, and "participate," concluding that the 'operation or management" test was an acceptable formulation of the statute's language.

> The word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required. **The "operation or management" test expresses this requirement in a formulation that is easy to apply** . . . [W]e hold that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," . . . one must participate in the operation or management of the enterprise itself.

Id. at 179, 113 S.Ct. at 1170 (emphasis added). The Court provided guidance concerning the scope of the operation or management test, observing:

> [Section] 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own*

> affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of *its* affairs – that is, participate in the operation or management of the enterprise itself. . . .

Id. at 185 (emphasis in original). The operation or management test was adopted from *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (*en banc*), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983) (stating, "a defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.")

Although the Supreme Court described the operation or management test as "easy to apply," the circuit courts have not found it to be so simple. *See, e.g., United States v. Starrett*, 55 F.3d 1525, 1546 (11th Cir. 1995), *cert. denied*, 517 U.S. 1111, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996) ("the Supreme Court has yet to delineate the exact boundaries of the operation or management test"). Cases interpreting *Reves* range from the Second Circuit holding that the "'operation or management' test typically has proven to be a relatively low hurdle for plaintiffs to clear,"[6]

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[6] Although the Second Circuit described the test to be a "low hurdle," some of its district courts were nevertheless dismissing RICO cases on the basis that *Reves's* operation or management test is "a very difficult test to satisfy." *E.g., Dubai*

(Continued on following page)

First Capital Asset Management, Inc. v. Satinwood, Inc., 385 F.3d 159, 176 (2nd Cir. 2004), to the Third Circuit holding that the operation or management test is only met in "certain rare instances." *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267 (3rd Cir. 1995). Some circuits have described *Reves's* operation or management test as requiring **control** over an enterprise's affairs, while others have stated that *Reves* does not even require **direction** of the enterprise's affairs, and still others have taken a result-oriented approach.

United States v. Posada-Rios, 158 F.3d 832, 856 (5th Cir. 1998), *cert. denied*, 526 U.S. 1031, 119 S.Ct. 1280, 143 L.Ed.2d 373 (1999) stated that the operation or management test did not require any "degree of decision-making power." The defendant argued he "was merely 'an independent purchaser who was buying from whomever . . . [and that] he had no power to direct the affairs of the enterprise.'" *Id.* He contended *Reves* required evidence that he had the ability "to 'set prices or schedule delivery dates and times.'" *Id.* The Fifth Circuit disagreed, stating, "[a]lthough such evidence would certainly be relevant to show that a defendant participated in the operation of an enterprise, *Reves* does not require it. ***Reves* only requires that a defendant 'take part in' the**

Islamic Bank v. Citibank, N.A., 256 F. Supp. 2d 158, 164 (S.D.N.Y. 2003); *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 403 (S.D.N.Y. 2000); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998).

operation of the enterprise, not that he direct its affairs." *Id.* (emphasis added).

In contrast, even though *Reves* rejected reading "significant control" into § 1962(c), as suggested by the District of Columbia Circuit in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied,* 501 U.S. 1222, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991),[7] the Seventh and Third Circuits have required proof of "control" in formulating restrictive tests under *Reves*. *E.g., Bachman v. Bear, Stearns & Co.,* 178 F.3d 930, 932 (7th Cir. 1999) (holding an outsider must exercise "some measure of **control**" over the enterprise (emphasis added)); *Jaguar Cars, supra*, at 267 (stating, "Unless the outsid[er] . . . is responsible for or in **control** of management decision making, enabling it to 'direct the enterprise's affairs,' there can be no RICO liability" (emphasis added)); *see, also, Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1542 (10th Cir. 1993) (sufficient evidence supported jury finding that officers of parent company controlled operations of affiliate reseller of automobile notes); *United States v. Castro,* 89 F.3d 1443, 1452 n.5 (11th Cir. 1996), *cert. denied,* 519 U.S. 1118, 117 S.Ct. 965, 136 L.Ed.2d 850 (1997) (stating in *dictum* that outsiders may exert sufficient control to satisfy *Reves*, citing *Aetna Cas.*

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[7] *Reves,* at 179, n.4 stating, "[f]or these reasons, we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires '*significant control* over or within an enterprise.'"

Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1559-60 (1st Cir. 1994)).

Other circuits have taken result-oriented approaches in applying *Reves*. *Aetna Cas. Sur. Co., supra*, held that a defendant's activities of submitting false claims to Aetna for payment was the operation or management of Aetna's affairs. In *Aetna,* policyholders and body shops were found liable under RICO for preparing and submitting fraudulent property damage claims to Aetna for payment. Aetna had alleged that it was a "victim enterprise" and the defendants were "outsiders" under *Reves*. *Id.* at 1558-59. The First Circuit held that "the evidence was sufficient to support a finding that the individual . . . **defendants' activities affected, in a material degree, the direction of Aetna's affairs . . .**" satisfying the *Reves* test. *Id.* at 1559-60 (emphasis added). The Second Circuit has noted, **"one who assists in the fraud also conducts or participates in the conduct of the affairs of the enterprise."** *First Capital Asset Management, supra*, at 178 (emphasis added); *but see, Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776, 789 (9th Cir. 1996), *cert. denied,* 519 U.S. 865, 117 S.Ct. 174, 136 L.Ed.2d 115 (1996) (attorney whose role as officer of corporation was purely ministerial not liable for statements promoting pyramid scheme); *Baumer v. Pachl,* 8 F.3d 1341 (9th Cir. 1993) (attorney's involvement in limited partnership fraud scheme was too limited and sporadic to satisfy *Reves*).

The circuits are also at odds in the situation where an outsider knowingly provides goods or services to a RICO enterprise. The Third and Seventh Circuits have held that providing goods and services beneficial to the enterprise's scheme, even with knowledge of the fraud, is not enough to meet the *Reves* standard. *University of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3rd Cir. 1993) ("Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise"); *Goren v. New Visions Int'l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998) ("[S]imply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c); instead, the individual must have participated in the operation and management of the enterprise itself"). On the other hand, the Sixth Circuit has held that continuing to allow the sale of defendant's products that are central to the fraudulent scheme with knowledge of wrongdoing is enough. *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 380 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193, 114 S.Ct. 1298, 127 L.Ed.2d 650 (1994) (holding in *dictum* that the outsider exercised sufficient direction over the enterprise where its product was crucial to the enterprise and it "continued to allow, if not actively encourage" enterprise participants after being warned of the illegal activity).

The difficulty of harmonizing conflicting formulations of *Reves* has caused the Second Circuit to hold that a fact finder must decide whether the *Reves* test has been met. In *United States v. Allen*, 155 F.3d 35 (2nd Cir. 1998), a civil case brought by the government, the question was whether trash haulers who bribed operators of a public landfill to under-weigh cargo had conducted the affairs of a RICO enterprise. In reversing summary judgment to the trash haulers, the court first outlined the conflicting decisions in the Second and other circuits:

> There is language in the opinions of several appellate courts, including our own, from which both sides on this appeal can take comfort. For example, we have said that "*Reves* makes it clear that a defendant can act under the direction of superiors in a RICO enterprise and still 'participate' in the operation of the enterprise within the meaning of § 1962(c)," [*United States v. Wong,* 40 F.3d 1347, 1373 (2nd Cir. 1994)], but we have also said that "[s]ince *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." [*United States v. Viola,* 35 F.3d 37, 41 (2nd Cir. 1996)]. *Compare MCM Partners v. Andrews-Bartlett & Associates,* 62 F.3d 967, 978-79 (7th Cir. 1995) (approving view that "'the "direction" requirement includes both those who direct, as well as those who take direction'") (quoting Daniel R. Fischel &

> Alan O. Sykes, *Civil RICO After Reves: An Economic Commentary,* 1993 SUP. CT. REV. 157, 192), *United States v. Starrett,* 55 F.3d 1525, 1548 (11th Cir. 1995) ("[W]e agree with the First Circuit that one may be liable under the operation or management test by 'knowingly implementing decisions, as well as by making them.'") (quoting *United States v. Oreto,* 37 F.3d 739, 750 (1st Cir. 1994)), *and United States v. Oreto,* 37 F.3d 739, 750 (1st Cir. 1994) (defendant may participate in conduct of enterprise "by knowingly implementing decisions, as well as by making them"), *with University of Maryland v. Peat, Marwick, Main & Co.,* 996 F.2d 1534, 1538-39 (3rd Cir. 1993) ("Under [*Reves*] not even action involving some degree of decision-making constitutes participation in the affairs of an enterprise.").

Allen, 155 F.3d at 42. The court was especially concerned with the inconsistent application of *Reves* to lower level employees:

> In most of the cases in which we have held lower level employees to be RICO participants, the defendant was shown to have played some management role in the enterprise. *See* [*United States v. Miller,* 116 F.3d 641, 673 (2nd Cir. 1997)]; [*United States v. Workman,* 80 F.3d 688, 697 (2nd Cir. 1996)]; [*United States v. Masotto,* 73 F.3d 1233, 1239 (2nd Cir. 1996)]; [*United States v. Thai,* 29 F.3d 785, 816 (2nd Cir. 1994)]. In *Napoli,* the defendants – investigators working pursuant to directions from attorneys in their firm to

> bribe witnesses and falsify evidence supporting tort claims – though not acting in a managerial role, "exercised broad discretion" in "carry[ing] out instructions from the law firm principals." *Napoli,* [*infra*] 45 F.3d at 683. Similarly, in *Wong,* at least two of the lower level employees whose convictions were upheld had significant managerial roles; Joseph Wang "moved up the ladder" and "began planning crimes," *Wong,* 40 F.3d at 1374, and Alex Wong "helped organize" an effort to locate witnesses who had identified him as a shooter, *see id.* However, other defendants in *Wong* appear to have been deemed RICO participants only because they committed crimes in furtherance of the enterprise, albeit under the direction of their supervisors. *See id.* The affirmance of their convictions is not easily harmonized with the assertion in *Viola* that "the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *Viola,* 35 F.3d at 41.

Id. Thus, the Second Circuit concluded that operation or management can only be determined by a fact finder at trial:

> We think the only principle to be drawn from this array of holdings and statements is that the commission of crime by lower level employees of a RICO enterprise *may* be found to indicate participation in the operation or management of the enterprise but does not

> compel such a finding. *Napoli* and *Wong* affirmed the fact-finding by juries, reached after a full trial. Unless a civil RICO defendant is indisputably directing the affairs of the enterprise, his commission of crimes that advance its objectives must be assessed by a fact-finder to determine whether or not his criminal activity, assessed in the context of all the relevant circumstances, constitutes participation in the operation or management of the enterprise's affairs.

Id.

Federal district courts have also noted the difficulties that have ensued in the lower courts' attempts to apply *Reves's* operation and management test. *E.g., State Farm Mutual Insurance Co. v. Abrams,* 2000 WL 574466 (N.D. Ill. 2000) (stating, "Since the issuance of the *Reves* decision, lower courts have struggled to define the amount of control an outsider must exert over an enterprise in order to be liable under Section 1962(c)."); *Resolution Trust Corp. v. S&K Chevrolet,* 918 F. Supp. 1235, 1246 (C.D. Ill. 1996), *vacated in part on other grounds,* 923 F. Supp. 135 (C.D. Ill. 1996) (stating, "[W]here the 'person' is distinct from the alleged 'enterprise' itself, the lower courts appear to be split about the level of participation required to exercise control over the enterprise's affairs."); *see also, Tribune Co. v. Purcigliotti,* 869 F. Supp. 1076, 1097, n.11 (S.D.N.Y. 1994), *aff'd sub nom., Tribune Co. v. Abiola,* 66 F.3d 12 (2nd Cir. 1995) (reaching the conclusion that a cause of action was stated under RICO under Second Circuit precedent,

but citing cases from other New York district courts reaching the opposite conclusions).

Not only is there confusion among the different circuits on how to apply the operation or management test, the Eighth Circuit, the original author of the test, has inconsistently articulated the scope of the test. In the case at bar, the Eighth Circuit stated, **"the word 'conduct' means the Bank exercised some degree of *control* over the operation or management of DCC's affairs."** *Dahlgren v. First National Bank of Holdrege* (App. 10) (emphasis added). Previously the court had stated, **"a 'person may participate in the conduct of an enterprise even though he *had no part* in the *control* of the enterprise.'"** *United States v. Darden,* 70 F.3d 1507, 1543 (8th Cir. 1995), *cert. denied,* 517 U.S. 1149, 116 S.Ct. 1449, 134 L.Ed.2d 567 (1996) (emphasis added) and **"it is not necessary that a RICO defendant have *wielded control* over the enterprise."** *Handeen v. Lemaire,* 112 F.3d 1339, 1348 (8th Cir. 1997) (emphasis added).

In *Darden,* the Eighth Circuit specifically rejected the notion that the operation or management test could be equated with requiring control over an enterprise. The *Darden* defendant, Jerry Lewis, argued, "'*Reves* held that a defendant must "control" the enterprise, that is, that a defendant must have some part in the control of the enterprise [*sic*] affairs.'" *Id.* at 1543. The Eighth Circuit disagreed with that interpretation of *Reves*:

> His citation of authority was to Justice Souter's dissent in *Reves,* where Justice

> Souter remarked (with obvious irony) that if the word "conduct" is limited to its role as a verb, a decision of the Court with which he disagreed, it is "plausible to find in it a suggestion of control." *Reves*, 507 U.S. at 187, 113 S.Ct. at 1174 (Souter, J., dissenting).

Id. The court stated, "the Supreme Court has never said that 'the word "conduct" when used as a verb suggests "control."'" *Id.* Instead, "the Court in *Reves* held that the government must prove some part in the *direction,* **not control**, of the enterprise's affairs." *Id.* (italic emphasis original; bold added).

Following *Darden,* the Eighth Circuit reiterated that the operation or management test does not require control of a RICO enterprise in *Handeen v. Lemaire,* 112 F.3d 1339 (8th Cir. 1997). *Handeen* held the plaintiff had pled sufficient allegations against an attorney and law firm that had represented the debtor in an allegedly fraudulent bankruptcy, stating, "[b]ehavior prohibited by § 1962(c) will violate RICO regardless of the person to whom it may be attributed, and we will not shrink from finding an attorney liable when he crosses the line between traditional rendition of legal services and active participation in directing the enterprise." *Handeen*, 112 F.3d at 1349. The court focused on the defendant's activity, not his status as an attorney, stating, "**The polestar is the activity in question, not the defendant's status**." *Id.* (emphasis added). The court concluded that:

> [I]f the Firm truly did associate with the enterprise to the degree encompassed by the Complaint, we would not hesitate to hold

> that the attorneys "participated in the core activities that constituted the affairs of the [estate]," *Napoli v. United States,* 32 F.3d 31, 36 (2nd Cir. 1994), *cert. denied,* 513 U.S. 1110, 115 S.Ct. 900, 130 L.Ed.2d 784, *and reh'g granted, factual inaccuracies corrected, and original determination confirmed,* 45 F.3d 680 (2nd Cir.), *cert. denied,* 514 U.S. 1084, 115 S.Ct. 1796, 131 L.Ed.2d 724, *and cert. denied,* 514 U.S. 1134, 115 S.Ct. 2015-16, 131 L.Ed.2d 1014 (1995), namely, the manipulation of the bankruptcy process to obtain a discharge for Lemaire. In that instance, the Firm would have played some "role in the conception, creation, or execution," [*Azrielli v. Cohen Law Offices,* 21 F.3d 512, 521 (2nd Cir. 1994)], of the illegal scheme, and we could safely say that the lawyers participated in the operation or management of the estate by assuming at least "*some* part in directing the enterprise's affairs." *Reves,* 507 U.S. at 179, 113 S.Ct. at 1170 (emphasis in original).

Id. at 1350.

Numerous articles have recognized the confusing inconsistency of rulings among the federal circuits and lower courts interpreting *Reves*. *E.g.*, M. Vitiello, *More Noise from the Tower of Babel: Making "Sense" out of Reves v. Ernst & Young*, 56 OHIO ST. L.J. 1363, 1398, n.282 (1995); C. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of Reves v. Ernst & Young*, 71 TUL. L. REV. 1133, 1161-62 (1997). It has been suggested that *Reves*

actually raised more questions than it answered. Vitiello, *supra* at 1398.

In addition to documenting the inconsistency that *Reves* has engendered, scholarly journals note that interpretations of the case have resulted in lower federal court rulings that are not justified by the language of 18 U.S.C. § 1962(c) or *Reves* itself. Courts generally hostile to RICO's civil liability provisions have tried to use *Reves* to narrow the scope of the statute:

> For those eager to see RICO narrowed, *Reves* is a welcome change. Indeed, many federal courts have found in *Reves* a broad invitation to limit RICO. But . . . many courts have demonstrated more hostility to RICO than fidelity to *Reves*.

Vitiello, *supra,* at 1387 (footnote omitted).

Primary among the difficulties in jurisprudence arising after *Reves* are decisions unduly circumscribing "outsider" liability, even though *Reves* clearly states that outsiders who operate or manage RICO enterprises may be held liable. *Reves,* at 184, 113 S.Ct. at 1173. Some courts have effectively adopted a *per se* exclusion of liability for outsiders, despite the broad language of § 1962(c) that makes it unlawful for "any person . . . associated with any enterprise" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs . . . " through a pattern of racketeering activity. G. Blakey & K. Roddy, *Reflections on Reves v. Ernst & Young: Its*

Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability under RICO, 33 AM. CRIM. L. REV. 1345, 1484 (1996). Several commentators have remarked particularly on the courts' readiness to conclude that outside professionals who supply services to RICO enterprises cannot be held liable under RICO on the basis they did not operate or manage the RICO enterprise. *Id.*; Madel, *supra*, 71 TUL. L. REV. at 1190 ("[S]ome courts have simply mischaracterized *Reves's* holding as altogether exempting professionals from § 1962(c) liability."); M. Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 306 (2004) ("[C]ongress should overturn the *Reves* decision by explicitly imposing liability upon outsiders who facilitate or promote the enterprise's pattern of racketeering activity. . . . [O]utside professionals should not enjoy automatic RICO immunity.").

Banks are frequent beneficiaries of the lower federal courts' unwillingness to find professional outsider operation or management of RICO enterprises. This reluctance was a major factor that led the Eighth Circuit panel to reverse the jury verdict for Petitioners in the instant case: "Plaintiffs have not cited and we have not found any post-*Reves* case in which a bank or financial services company was held to have conducted the affairs of a RICO enterprise

that was an unrelated customer of the bank."[8] *Dahlgren v. First National Bank of Holdrege* (App. 11) (footnote omitted) (citing *Dongelewicz v. PNC Bank N. A.*, 104 Fed.Appx. 811 (3rd Cir. 2004), *cert. denied*, 543 U.S. 1096, 125 S.Ct. 965, 160 L.Ed.2d 910 (2005) and *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340 (S.D.N.Y. 1998)). An outcome that depends on the defendant's status rather than an analysis of the defendant's conduct is unjust and arbitrary, but that has been an all-too-common product of the lower courts' application of *Reves*:

> The reception of the *Reves* operation or management test in the circuit courts of appeal is neither even nor thoughtful. *Reves* is not carefully read against the background of general jurisprudence. The Supreme Court's opinion is viewed in isolation. The decisions of the courts of appeals are characterized by an unfortunate tendency to read *Reves* as embodying a per se exclusion for "outsiders," that is, to afford errant professionals – accountants or lawyers – a safe harbor from liability under § 1962(c).

Blakey & Roddy, *supra*, 33 AM. CRIM. L. REV. at 1484.

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[8] Contrary to the court's opinion, some cases have concluded that causes of action were stated against banks for participating in the conduct of the affairs of customers who were RICO enterprises. *Sumitomo Corp. v. Chase Manhattan Bank*, 2000 WL 1616960 (S.D.N.Y. 2000); *Burke v. Dowling*, 944 F. Supp. 1036 (E.D.N.Y. 1995); *Bowdoin Const. Corp. v. Rhode Island Hosp. Trust Nat. Bank, N.A.*, 869 F. Supp. 1004 (D. Mass. 1994).

Another aspect of the inconsistent application of the operation or management test is lower courts' readiness to apply an expansive interpretation of the test in criminal cases, while utilizing a narrow and restrictive view of the test in civil cases.[9] Blakey & Roddy, *supra*, 33 AM. CRIM. L. REV. at 1484 ("While in theory, at least, the results in the decisions should not turn on the criminal or civil character of the appeal, a marked tendency is present to uphold criminal prosecutions, but dismiss civil litigation under RICO."); Goldsmith, *supra*, 41 HARV. J. ON LEGIS. at 287-88; *see also,* I. Raphaelson & M. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669 (1994) (arguing *Reves* and other Supreme Court decisions have applied different standards in civil and criminal cases). In fact, the statistics on the success of civil RICO cases are startling:

> A survey of all federal appellate decisions in RICO cases rendered between 1999 and 2001, provides a snapshot of contemporary RICO jurisprudence. It reveals that most RICO cases are civil (78%) and most are brought by a single plaintiff or by a fairly small group of plaintiffs. This survey also

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[9] Concern has been expressed that restrictions placed on *Reves's* operation or management test in civil cases will ultimately result in damaging RICO as an effective tool in criminal prosecutions. I. Raphaelson & M. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669 (1994).

> reveals a dismal rate of success for RICO plaintiffs. Almost 70% of the civil cases resulted in early, decisive victory for defendants where defendants' motions to dismiss or motions for summary judgment were granted by the trial courts, with affirmation on appeal. Plaintiffs were successful in obtaining judgments at trial in 9.6% of the RICO cases surveyed but only one-fourth of those judgments were affirmed on appeal, resulting in a stunningly awful final success rate for RICO plaintiffs: of 145 civil cases, only 2% (3 out of 145), resulted in ultimate, final victory for the plaintiffs.

P. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 (2002) (footnotes omitted). Because the same RICO substantive language applies to criminal and civil proceedings, this inconsistency is logically indefensible and contrary to legislative intent. Moreover, commentators point out that the RICO act, including its civil remedies, was intended to function as a weapon against white collar crime as well as organized crime; judicial limitations on RICO's civil remedies that have followed *Reves* are therefore contrary to and obstructive of Congressional intent. Goldsmith, *supra*, 41 HARV. J. ON LEGIS. at 285; S. Paccagnini, *How Low Can You Go (Down the Ladder): The Vertical Reach of RICO*, 37 J. MARSHALL L. REV. 1, 6-7 (2003).

These decisions in combination – exempting outsiders from liability and applying divergent standards in criminal cases – have been criticized for

resulting in an unacceptable *de facto* double standard in RICO cases:

> This liability distinction 'can prove pernicious,' not only when there is a punishment differential between high-priced consultants and low-level employees, but also when there is a distinction between professional employees and professional affiliates. Moreover, to the extent that Oreto's [*United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994)] horizontal-vertical distinction bases liability on one's legal relationship to the enterprise rather than on one's conduct, it disregards notions of equal treatment and fundamental tenets of just criminal punishment.

Recent Case, *Racketeer Influenced and Corrupt Organizations Act (RICO) – Scope of Liability after Reves v. Ernst & Young*, 108 HARV. L. REV. 1405, 1409 (1995) (footnotes omitted); *accord*, Vitiello, *supra*, 56 OHIO ST. L.J. at 1391-92.

Among the most troubling of these cases in which the courts have relied on *Reves* to restrict RICO's civil liability of outsiders are cases like the instant matter in which an outsider is actively involved in fraud or other wrongdoing on behalf of the RICO enterprise. In such cases, the outsider is clearly involved in the operation or management of the enterprise, yet lower courts have relied on *Reves* to shield these wrongdoers from liability.

> [W]hile one cannot operate or manage an enterprise's affairs by merely providing

> services or counsel to the enterprise, one should satisfy the test if he or she is personally involved in the performance or effectuation of its affairs. The distinction between a remote and clear nexus thus lies in the admittedly ambiguous difference between suggesting options for or assessing an enterprise's affairs and taking responsibility for or undertaking (i.e. "operating") its affairs.

Madel, *supra,* 71 TUL. L. REV. at 1181.

> An individual acting to benefit the enterprise and also meeting the pattern requirement should fall within § 1962(c) whether he or she is formally employed by the enterprise or only "associated" with the enterprise. . . . Rephrased, § 1962(c) would appear to be satisfied when a defendant, united in interest with the enterprise, for example, by a desire to advance the interests of the enterprise, engages in a pattern of racketeering.

Vitiello, *supra,* 56 OHIO ST. L.J. 1403.

In the instant case, the jury could have found that Respondent FNBH gained control of its customer DCC by illegal acts, then cooperated with and utilized DCC as a RICO enterprise over a period of years in a successful mail fraud scheme. The jury found, and the Eighth Circuit recognized, that the bank actively and repeatedly deceived Petitioners as customers of DCC concerning DCC's financial strength, which the jury

could have found to be part of the RICO mail and wire fraud scheme.

After a lengthy trial, the parties in this matter agreed to jury instructions that fairly set forth *Reves's* operation or management test. Applying that instruction to the evidence, the jury found that FNBH participated in the conduct of DCC's affairs as a RICO enterprise. Yet the Eighth Circuit reversed, concluding that the bank was an outsider that did not exercise sufficient control over DCC.

Clearly, a bank that provides legitimate banking services does not participate in the conduct of a RICO enterprise, but it is contrary to *Reves* to hold that an outsider who performs core activities in accomplishing the fraudulent scheme cannot be liable under RICO, regardless of whether the outsider is a bank.

CONCLUSION

Under these circumstances, Petitioners respectfully submit that this Court should revisit *Reves* by granting a writ of certiorari in this case to provide the lower courts with additional guidance concerning the circumstances under which a party "associated with" an enterprise may be held liable for conducting or participating in the conduct of the enterprise's affairs through a pattern of racketeering activity under RICO.

Respectfully submitted,

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533 F.3d 681 (8th Cir. 2008)

Dave DAHLGREN, et al.,
Plaintiffs-Appellees,
v.
FIRST NATIONAL BANK OF HOLDREGE,
Defendant-Appellant.

No. 07-1951.

United States Court of Appeals,
Eighth Circuit.

Submitted: Dec. 12, 2007.

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Rehearing and Rehearing En Banc
Denied Aug. 22, 2008.

William Frederick Hargens, argued, Robert J. Bothe, James J. Niemeier, on the brief, Omaha, NE, for appellant.

Rodney M. Confer, argued, Jeanelle R. Lust, on the brief, Lincoln, NE, for appellee.

Before LOKEN, Chief Judge, WOLLMAN and SHEPHERD, Circuit Judges.

LOKEN, Chief Judge.

When Damrow Cattle Company ("DCC") was placed in involuntary receivership and a Chapter 7 bankruptcy proceeding, fourteen cattle investors and

corn producers[1] who were fattening cattle and storing grain at the DCC feedlot lost over $1.7 million plus nearly $200,000 in bankruptcy litigation expenses. They sued the First National Bank of Holdrege ("the Bank"), DCC's primary lender from 1983 until 2000, for treble damages and attorneys' fees under the Racketeering Influenced and Corrupt Organizations Act ("RICO") and for fraud and negligent misrepresentation under state law, claiming that the Bank misled them into continuing to do business with DCC by concealing its increasing financial weakness to protect the Bank's substantial interest as DCC's creditor. A jury found the Bank liable on all claims, and the district court denied without opinion the Bank's post-verdict motion for judgment as a matter of law. The Bank appeals. We reverse the denial of judgment as a matter of law on the RICO claims. Reviewing the facts in the light most favorable to the jury's verdict, we affirm in part and reverse in part the jury verdict on the various fraud claims. *See Fowler v. SmithKline Beecham Clinical Labs., Inc.*, 225 F.3d 1013, 1014 (8th Cir.2000) (standard of review).

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[1] Dave Dahlgren, Dahlgren's Inc., Theodore Collin, Lloyd Erickson, Erickson Land and Cattle, Dixon Granstra d/b/a Granstra Cattle, DG Farms, Inc., Skane, Inc., Clark Nelson, Wells AG Enterprises, Inc., Don Sjogren, BJW Farms, Inc., EWW Farms, Inc., and Dwayne Kudlacek.

I. Factual Background

Dennis Damrow ("Damrow") and his brother and father began operating DCC as a commercial feedlot near Holdrege, Nebraska, in 1983. The Damrows formed a financing company, DFF, Inc., that offered investors the option of borrowing the cost of purchasing and feeding cattle at DCC. Damrow was the general manager of DCC and managed the day-to-day operations of DFF. The Bank provided loans and banking services to both companies. In 1990, Damrow invested in and began managing a second feedlot, Carter Feeders, near Orleans, Nebraska. The Bank provided banking services for Carter Feeders and its financing entity, CFF, Inc.

Investors placed feeder cattle at the feedlot, where DCC fattened the cattle before selling them to meat packers. DCC billed investors monthly for feed and other costs. Investors who farmed in the area also stored grain at the feedlot, either to feed their own cattle or to sell to DCC. An investor financing the purchase and fattening of cattle through DFF signed a promissory note to DFF. DFF signed a promissory note and assigned the investor's note to the Bank in exchange for a loan to purchase the cattle. When DCC sold cattle to a meat packer, the packer sent the purchase price to the Bank, which deposited the funds into DCC's account. DCC recovered its feedlot expenses, reimbursed DFF for its advances, and paid the investor his down-payment and any profit from the sale. DFF repaid the Bank's loan. Investors

commonly used their share of the sale proceeds to finance a new lot of cattle at DCC.

DCC experienced steady growth, expanding its operating capacity from 1,200 cattle in 1983 to 17,500 cattle when it was placed in receivership in 2001. Damrow testified that after 1996, DCC owned thirty to fifty percent of the cattle being fed at any given time. Dr. Rodney Jones, an agricultural economics professor, testified as plaintiffs' expert that the owner of cattle incurs greater risk in cattle feeding than the feedlot operator, so the percentage of cattle owned by the feedlot significantly affects its risk of loss.

From 1994 through 1998, Dr. Jones and others testified that the Bank repeatedly honored checks when the DCC and DFF accounts were substantially overdrawn, sometimes in excess of $1 million, and DCC had no unborrowed amount on its working capital line of credit. DCC often waited months after selling a lot of cattle before using the proceeds to pay the corresponding DFF note, thereby using money borrowed by DFF to effectively increase DCC's borrowings. The Bank contributed to this credit-shifting process by refusing on multiple occasions to process DCC checks to pay off DFF notes when DCC's account was overdrawn. Dr. Jones testified that these large overdrafts suggested a borrower with cash flow problems that could lead to business failure. However, substantial overdrafts ceased after the DCC and DFF lines of credit were increased in mid-to-late 1997 when the Bank's correspondent regional bank, First National Bank of Omaha ("FNBO"), investigated

Damrow and agreed to participate in these lines of credit. By May 1999, FNBO's participation in the DCC operating line of credit and the DFF investor line of credit had increased to a total of $7 million.

In 1996 and 1997, two junior officers at the Bank warned senior management of irregularities in the financing of DFF – large initial advances in round figures to purchase cattle and feed, some totaling more than the cattle would bring when sold; note maturities longer than the four-to-five months needed to fatten cattle; and DFF notes remaining unpaid for months after the cattle were sold. After receiving the second officer's critical memorandum, DCC loan officer Ron Sterr wrote a letter asking Damrow to address the problem of DFF overdrafts and overdue notes. However, Sterr and Bank president Kenneth Slominski excused the failure to pay DFF notes when cattle were sold by suggesting that Damrow was just replacing the sold cattle with new feeder cattle for the same investors.[2]

In September 1997, the Bank entered into an agreement with the Office of the Comptroller of the Currency to address the Bank's deteriorating condition. The agreement required the Bank to make management changes, appoint an oversight committee,

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[2] Even if accurate, this rationale did not excuse the failure to use sale proceeds to pay off the *investors'* notes to DFF for the initial purchase of the sold cattle, notes held by the Bank as DFF's assignee. However, this lawsuit is not about that risk to the plaintiff investors, as all DFF notes were eventually paid.

abide by new lending limits and procedures, and reduce classified and non-performing assets. A new president was hired in late 1998, charged with the task of eliminating classified and non-performing assets so that the Bank could achieve compliance with the regulatory agreement. Cattle losses in 1997 and 1998 caused DCC's loan rating at the Bank to decline from a "1" in 1997, to a "4" in mid-1999, which placed its line-of-credit loan on the Bank's "watch" list.

In September 1999, after years of losses and increasing liabilities, the nonDamrow shareholders at Carter Feeders told the Bank they suspected Damrow of falsifying financial statements by overstating the cattle owned by Carter Feeders by over $1 million. Damrow ceased managing Carter Feeders in November 12, and Carter Feeders declared bankruptcy in December 1999. Upset with the Bank's handling of the Carter Feeders problem, Damrow asked FNBO if it would take over all of the various Damrow credits in December 1999.

In January 2000, Damrow admitted to the Bank that he had filed false financial statements for Carter Feeders, blaming the other Carter Feeders shareholders. The Bank's board of directors decided to end its banking relationship with Damrow on January 9, 2000. After persuading Damrow to sign a new deed of trust on the DCC feedlot, which was owned by Damrow or his personal farming entity, the Bank told Damrow to find a new lender. Damrow continued discussions with FNBO, which took over the DCC and

DFF credits on April 14 after conducting its own due diligence investigation. Participating with FNBO was Adams Bank & Trust, where loan officer Sterr began working after leaving the Bank in late 1999. The Bank severed its last tie with the Damrow credits on July 18, 2000, when a final term note was paid from proceeds of Damrow's sale of the feedlot property, consistent with his refinancing agreement with FNBO.

In January 2001, FNBO heard that double counting of cattle was occurring at the DCC feedlot. FNBO investigated and quickly placed DCC into receivership, liquidating its cattle inventory. An involuntary Chapter 7 bankruptcy followed. FNBO and Adams Bank & Trust sued the Bank for failing to disclose financial information about the Damrow operations; both cases settled. After litigating with FNBO and the DCC trustee over ownership of corn and cattle at the feedlot when the receivership began, plaintiffs commenced this action to recover from the Bank their losses and litigation expenses in the DCC bankruptcy. Damrow pleaded guilty to felony charges that, between December 1993 and January 2001, he schemed to defraud the Bank, FNBO, and Adams Bank & Trust by materially misrepresenting the ownership of cattle on borrowing reports to the banks, by falsifying documents to deceive inspectors and bank representatives regarding the ownership of cattle at the DCC and Carter Feeders feedlots, and by pledging to the banks cattle that were owned by others. Sentenced to forty months in prison, Damrow

was incarcerated at the time of trial and testified for the plaintiffs by deposition.

II. The RICO Claims

Enacted to strengthen criminal and civil remedies against organized crime, RICO provides a private right of action for any person "injured in his business or property by reason of a violation of" its substantive prohibitions. 18 U.S.C. § 1964(c). The prohibition at issue here is 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

To prevail on their RICO claims, plaintiffs must prove that the Bank engaged in the conduct of an enterprise through a pattern of racketeering activity. The enterprise in question was DCC. The Bank's alleged predicate acts of racketeering were multiple instances of mail fraud and wire fraud as defined in 18 U.S.C. §§ 1341 and 1343, offenses that are included in the definition of "racketeering activity" in 18 U.S.C. § 1961(1)(B). To constitute racketeering activity under RICO, the predicate acts must be related and must "amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*,

492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). "Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). "Though mail fraud can be a predicate act, mailings are insufficient to establish the continuity factor unless they contain misrepresentations themselves." *Wisdom v. First Midwest Bank of Poplar Bluff,* 167 F.3d 402, 407 (8th Cir.1999).

The Bank argues that plaintiffs introduced insufficient evidence that the Bank "conduct[ed] or participate[d], directly or indirectly, in the conduct of [DCC's] affairs through a pattern of racketeering activity" within the meaning of § 1962(c). We agree. "In order to participate, directly or indirectly, in the conduct of [an] enterprise's affairs, one must have some part in directing those affairs." *Reves v. Ernst & Young,* 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) (quotations omitted). Although § 1962(c) liability is not limited to those with a formal position within the enterprise:

> § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own* affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of *its* affairs – that is, participate in the

> operation or management of the enterprise itself. . . .

Id. at 185, 113 S.Ct. 1163 (emphasis in original). Thus, the word "conduct" means the Bank exercised some degree of control over the operation or management of DCC's affairs.

When the RICO defendant was the alleged enterprise's principal lender, a court considering a motion for summary judgment or for judgment as a matter of law must carefully distinguish between the bank conducting its own affairs as creditor, and the bank taking additional steps as an outsider to direct the operation or management of its customer, the RICO enterprise. As the Third Circuit stated in a similar case, "While it is certainly true that a major creditor of a corporation can have substantial persuasive power and some legal authority over [a borrowing customer's] management, alone, such power is not equivalent to having the power to conduct or participate directly or indirectly in the conduct in the affairs of those corporations." *Dongelewicz v. PNC Bank Nat'l Ass'n,* 104 Fed.Appx. 811, 817-18 (3d Cir.2004) (unpublished) (quotations omitted), *cert. denied,* 543 U.S. 1096, 125 S.Ct. 965, 160 L.Ed.2d 910 (2005). A bank's financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent "operation and management" test of *Reves. See Schmidt v. Fleet Bank,* 16 F.Supp.2d 340, 346-48

(S.D.N.Y.1998), and cases cited.[3] In *Schmidt,* allegations that the bank approved overdrafts on 500 occasions, misrepresented the status of accounts to investors, and helped its customer conceal his fraudulent scheme were held to be insufficient to satisfy this test. Plaintiffs have not cited and we have not found any post-*Reves* case in which a bank or financial services company was held to have conducted the affairs of a RICO enterprise that was an unrelated customer of the bank.[4]

With one possible exception, all of the Bank's actions that plaintiffs cite as evidence of the Bank's control of DCC fall into the category of a creditor conducting its own affairs. The Bank allowed the commingling of Damrow entity funds, honored substantial overdrafts (in effect, informally increasing the borrower's line of credit, for a one-time fee), allowed DFF notes to the Bank to remain past due (again, thereby increasing DCC's line of credit), honored DCC n.s.f. checks to investors, recommended its customer DCC to other Bank customers, encouraged its correspondent regional bank to participate in the lines of credit, told Damrow he must increase equity investment and eliminate intra-enterprise liabilities on DCC's financial statement to get a loan

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[3] Abrogated on other grounds by *Pavlov v. Bank of New York Co.*, 25 Fed.Appx. 70 (2d Cir.2002) (unpublished).

[4] In *Brown v. LaSalle Northwest Nat'l Bank,* 820 F.Supp. 1078, 1082 (N.D.Ill.1993), affiliates of the bank were the RICO enterprise.

approved, transferred funds between Damrow entity accounts pursuant to loan agreement cross-guarantees without Damrow's permission, and required Damrow to sign a new deed of trust on the feedlot. As the court held in *Schmidt,* simply because a bank *allows* a heavily indebted customer to take actions such as overdrafts and late note payments that the bank might prevent by exercising its formidable rights as creditor is not evidence that the bank controlled the customer's operations and management. 16 F.Supp.2d at 346-48. "Bankers do not become racketeers by acting like bankers." *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank,* 934 F.2d 976, 981 (8th Cir.1991).

The possible exception, which plaintiffs greatly emphasized at trial and on appeal, involved the Bank's actions when a substantial Damrow customer, John Morken, became insolvent in 1994. In June 1994, Damrow learned that Morken was facing bankruptcy. The Bank had advanced some $5 million on DFF and CFF notes secured by cattle that Morken was then feeding at the DCC and Carter Feeders feedlots. DCC was also an unsecured creditor for grain fed to those cattle, and Damrow testified he had received payments from Morken that might be voidable preferences in a Morken bankruptcy. Damrow immediately contacted Slominski at the Bank. Slominski and the Bank's attorney decided that the Bank would foreclose on the cattle and that DCC and Carter Feeders would buy the foreclosed cattle for the amount of the DFF and CFF notes, using funds

borrowed from the Bank. Damrow testified that he was hesitant to purchase the Morken cattle but did so because of his twenty-year relationship with the Bank, because Slominski promised him that DCC would not suffer financially, and because it was the only way he could recover DCC's substantial claim for feed "owed off the John Morken cattle."

Following the foreclosures, the Bank discovered that some of the foreclosed notes were signed by Morken personally, rather than as an officer of his company, Spring Grove Livestock. The Bank did not have perfected security interests in cattle owned by Morken personally. Damrow testified that Slominski and the Bank's attorney drove to the DCC feedlot and had the Morken notes altered, using the typewriter Damrow used to create the notes to add "Spring Grove Livestock" on the top of each note and "authorized agent" above Morken's signature. The Morken and Spring Grove bankruptcy trustees discovered the alterations and sued the Bank, DCC, Carter Feeders, DFF and CFF to set aside the foreclosures and to recover the entire value of the DFF and CFF notes. The parties negotiated, and Slominski told Damrow the Bank wanted to settle the dispute with the trustees for $2.6 million, with the Bank paying half and DCC and Carter Feeders paying the other half, using funds borrowed from the Bank. Damrow testified that, after Slominski threatened not to renew the DCC and Carter Feeders lines of credit, Damrow met with their other shareholders, who unanimously agreed to settle.

Plaintiffs argue that the Bank controlled DCC's actions in purchasing the Morken cattle at an inflated foreclosure price, illegally altering the Morken notes, and agreeing to a costly settlement with the trustees, leaving DCC with a debt burden that ultimately led to its receivership some six years later. Plaintiffs note that DCC had only a small stake in the Morken bankruptcy – its unpaid feed – because DCC had not guaranteed the DFF and CFF notes to the Bank. Therefore, the Bank, not Damrow, must have controlled DCC's irrational decision to help fund the settlement. We certainly agree that the Bank's action in altering the Morken notes was shameful. But it was Damrow who made the decisions that DCC would help purchase the cattle in foreclosure and contribute to the settlement of claims by the Morken and Spring Grove trustees. Urging Damrow to take those actions was consistent with the Bank's control of its own affairs as creditor. And those decisions were not so irrational, from Damrow's and DCC's perspective, as to demonstrate that the Bank was controlling DCC.[5] More importantly, this was an isolated incident that occurred long before the Bank's alleged predicate acts with the plaintiffs. Therefore, even assuming

[5] Damrow testified that the settlement permitted the Damrow and Carter Feeders entities to avoid possible preference claims relating to the $8-9 million of feedlot business in the 90 days before the Morken and Spring Grove bankruptcies. More significantly, every DCC and Carter Feeders shareholder met personally with the Bank and agreed to those companies participating in the settlement.

that a rational jury could believe the testimony of Damrow – who was convicted of defrauding the Bank and other DCC lenders – that the Bank controlled DCC's actions in these unfortunate transactions, that is not sufficient evidence that the Bank "engaged . . . in the conduct of [DCC's] affairs through a pattern of racketeering activity" that injured the plaintiffs years later.[6]

Because plaintiffs failed to establish that the Bank directed the operations or management of DCC during the time they were allegedly injured by the Bank's pattern of racketeering activity, the district court erred in denying the Bank's motion for judgment as a matter of law dismissing their RICO claims. Therefore, we need not consider the Bank's arguments that plaintiffs failed to prove other elements of these claims.

II. State Law Tort Claims

Plaintiffs asserted tort claims against the Bank for fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation under Nebraska law. The jury returned verdicts in favor of each plaintiff on all three claims. The Bank appeals the district court's denial of its motion for judgment as a matter of law on these distinct but related

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[6] Our decision in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir.1997), on which plaintiffs heavily rely, is clearly distinguishable for this reason, and others.

claims. As the district court submitted a single damage question for the multiple claims, we must affirm the jury's award to a plaintiff if the evidence supports the award on any one of the claims. *See Conseco Fin. Serv. Corp. v. N. Am. Mortgage Co.,* 381 F.3d 811, 823 (8th Cir.2004).

A. The Elements of Each Tort

1. Fraudulent Misrepresentation. Plaintiffs' fraudulent misrepresentation claims required proof that an agent of the Bank knowingly or recklessly made a false representation of material fact with the intent that plaintiff rely on it, and that plaintiff did reasonably rely resulting in damage. *See Four R Cattle Co. v. Mullins,* 253 Neb. 133, 570 N.W.2d 813, 816 (1997); *Henderson v. Forman,* 231 Neb. 440, 436 N.W.2d 526, 532 (1989). The Supreme Court of Nebraska looks to § 531 of the Restatement (Second) of Torts (1977) in analyzing fraudulent misrepresentation claims. *Bank of Valley v. Mattson,* 215 Neb. 596, 339 N.W.2d 923, 927 (1983). Section 531 provides that liability is limited to a plaintiff's "pecuniary loss suffered . . . through . . . justifiable reliance in the type of transaction in which [defendant] intends or has reason to expect [plaintiff's] conduct to be influenced." Comment *g* explains that the reference to the *type* of transaction expected means that the transaction that in fact causes pecuniary loss "may differ in matters of detail or in extent, unless these differences are so great as to amount to a change in the essential character of the transaction."

2. Fraudulent Concealment. Under Nebraska law, the Bank is liable for fraudulent concealment if it had a duty to disclose a known material fact, concealed that fact with the intent that plaintiff act in response to the concealment, and plaintiff reasonably relied and was injured by the concealment. *See Streeks, Inc. v. Diamond Hill Farms, Inc.*, 258 Neb. 581, 605 N.W.2d 110, 118 (2000). The Court in *Streeks* held that "whether a legal duty exists is a question of law" and that § 551 of the Restatement (Second) of Torts "properly sets out when a duty to disclose may arise." *Id.* at 119, 121.[7] Section 551(2) provides in relevant part:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or

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[7] The Bank argues that the district court erred in not submitting the factual aspects of this issue to the jury. This contention was waived when counsel for the bank, having initially raised the issue, conceded during a mid-trial discussion with the district court and again during the jury instructions conference that the court's fraudulent concealment instruction properly treated the issue of duty as one of law for the court. *See generally United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

> believed to be so; and . . . (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably expect a disclosure of those facts.

3. Negligent Misrepresentation. The Supreme Court of Nebraska has adopted "the definition of the negligent misrepresentation cause of action found in § 552" of the Restatement (Second) of Torts. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910, 922 (1994). Section 552 provides in relevant part:

> (1) One who, in the course of his business . . . or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person . . . for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Liability for negligent misrepresentation "is more restricted than for fraudulent misrepresentation" because of "the difference between the obligations of honesty and of care." *Gibb*, 518 N.W.2d at 921.

B. Discussion

When a third party asks a bank about its customer's financial affairs or condition, the bank's general duty of confidentiality to its customers is at issue.[8] Nonetheless, though the issue has not been squarely addressed, we agree with the district court that the Supreme Court of Nebraska would apply the above-summarized tort principles to claims that a bank deceived or misled the third party in responding to the inquiry. *See R.A. Peck, Inc. v. Liberty Federal Sav. Bank,* 108 N.M. 84, 766 P.2d 928, 932-37 (1988), discussed favorably in *Streeks,* 605 N.W.2d at 120.

Our research suggests that, in every case where banks were held liable for misrepresentations or nondisclosures about their customers' affairs, "the banks were directly involved with the third parties in the

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[8] *See Kesselman v. Nat'l Bank of Ariz.*, 188 Ariz. 419, 937 P.2d 341, 343-46 (Ariz.App. 1996) (analyzing the confidentiality issue and collecting cases).

transactions that were the subject of litigation." *Kesselman,* 937 P.2d at 345. Here, on the other hand, every transaction plaintiffs entered into with DCC that gave rise to their damage claims in this lawsuit occurred *after* the Bank ended its customer and lending relationships with DCC and Dennis Damrow. Moreover, most plaintiffs were aware that FNBO had replaced the Bank as Damrow's lender before their loss-causing cattle and corn transactions. Plaintiffs' theory was that the Bank's false representations and non-disclosures about DCC's financial condition and the status of its borrowings with the Bank lulled plaintiffs into continuing to do business with DCC, resulting in their losses. Yet prior to entering into the loss-causing transactions in 2000, no plaintiff asked an FNBO loan officer (or Sterr, who was now the loan officer for DCC at Adams Bank, the bank participating with FNBO on the Damrow credits) for information about DCC's current financial condition or the status of its borrowings. These facts require us to focus more closely on the specific misrepresentations and non-disclosures alleged by each plaintiff. We begin with those who discussed DCC with Bank officers after FNBO replaced the Bank.

Lloyd Erickson and Erickson Land and Cattle. Lloyd Erickson and the corporation he owned with his son began feeding cattle and delivering corn to DCC in the late 1980s. Both were also long-standing customers of the Bank. In early 2000, the Ericksons heard negative rumors about Damrow from the Carter Feeders shareholders. Erickson testified

that, at a meeting in May, his father asked Bank president Riley and former DCC loan officer Eric Titus whether DCC is "an okay place to [be] feeding?" Titus responded, "as far as we know, everything is fine." Based on that assurance, the Ericksons continued to do business with DCC, delivering corn to DCC in September and purchasing two lots of cattle. Erickson and Erickson Land and Cattle lost $66,393.58 in cattle, $69,743.66 in corn and incurred $26,476.62 in attorneys' fees after DCC was placed in receivership.

There is ample evidence in the record that Titus was aware of significant financial problems with DCC when he made this affirmative misrepresentation. Titus had tracked past due DCC notes and overdrafts for years, reported to the Bank's board of directors about the deteriorating Carter Feeders situation on January 3, 2000, and was present for the discussion of the Damrow lines of credit at that meeting, which led to the board's decision to end its relationship with Damrow and DCC. Titus repeatedly stated, "I do not recall," when asked about his knowledge of the financial condition of DCC, testimony the jury likely considered evasive. At a minimum, Titus was negligent in telling Bank customer Erickson that "everything is fine" at DCC without disclosing that the Bank had ended its relationships with Damrow. In these circumstances a reasonable jury could find that Titus made this false and misleading statement intending to influence or guide the Ericksons into continuing to do business with DCC, or at least

knowing that his statement would have that influence. *See Gibb,* 518 N.W.2d at 921. The verdict in favor of Erickson and Erickson Land and Cattle on their tort claims is affirmed.

Skane, Inc. Harold and Judy Erickson farm near Holdrege and began delivering corn and feeding cattle at the DCC feedlot in the early 1990s. Every year until 1999, Harold would ask a friend at the Bank, Gary Mueller, about DCC; Mueller always said the company was "okay as far as I know." When Mueller left the Bank in early 1999, Harold spoke with Eric Titus and received a similar assurance. In 2000, having heard negative rumors about the Carter Feeders dispute, Harold again asked Titus about DCC. Titus responded "that they were okay" without disclosing what he knew about DCC's condition or that the Bank was out of the credit. Harold testified that he relied on that representation when the Ericksons' corporation, Skane, Inc., stored corn and purchased cattle at DCC later that year.

Titus in the course of his business at the Bank made a gratuitous false or misleading representation that he knew would influence Harold Erickson to enter into contemporaneous cattle feeding transactions with DCC. Although it is unclear what benefit might accrue to the Bank from this misrepresentation, as neither Erickson nor DCC were Bank customers in 2000, we conclude that the Supreme Court of Nebraska would affirm the jury's verdict holding the Bank liable, at least under a negligent misrepresentation theory, for Skane's pecuniary losses from its

transactions with DCC in 2000 – $61,233.86 in cattle, $33,911.09 in corn, and $77,718.72 in attorneys' fees in the DCC bankruptcy proceedings. *See Peck,* 766 P.2d at 936, discussing *Central States Stamping Co. v. Terminal Equip. Co.,* 727 F.2d 1405, 1409 (6th Cir.1984), and citing *Ostlund Chem. Co. v. Norwest Bank of Jamestown,* 417 N.W.2d 833 (N.D.1988).

Clark Nelson. Nelson farms near Holdrege and was a customer of the Bank for many years when his loan officer, Slominski, introduced Nelson to Damrow in 1995. Nelson began delivering corn and feeding cattle at DCC. Each year, before applying for a loan to feed cattle at DCC, Nelson asked his loan officers, Sterr and Craig DeWalt, whether DCC was a sound company. Each year they responded affirmatively. In August 2000, Nelson applied for a loan from the Bank to purchase a pen of cattle at DCC. Nelson testified that DeWalt again said that DCC was "fine to do business with." Nelson testified that he relied on that assurance in obtaining the loan, purchasing the cattle, and then delivering a portion of his corn crop to DCC to feed the cattle later that year. Nelson did not suffer cattle losses as a result of DCC's bankruptcy, but he lost $22,638.56 on the stored corn. Although Nelson did not claim DeWalt purposely misled him, a reasonable jury could find that DeWalt made a negligent misrepresentation intending to influence customer Nelson into borrowing money from the Bank to enter into contemporaneous transactions with DCC.

Wells AG Enterprises, BJW Farms, EWW Farms, Inc., Dwayne Kudlacek. Gary and Bob Wells own and operate Wells AG Enterprises, BJW Farms, and EWW Farms, Inc. Dwayne Kudlacek is Gary Wells's brother-in-law. All farm near Holdrege and were customers of the Bank until some time in 2000 or 2001. Gary Wells delivered corn to the DCC feedlot for many years and began feeding cattle in 1997. Bob Wells began delivering corn to the DCC feedlot in the late 1990s. Kudlacek had the misfortune of first delivering corn to DCC in September, 2000.

Gary and Bob testified that they annually asked their loan officers at the Bank if it was safe to do business with DCC and were repeatedly assured that it was. In August 2000, Gary asked Eric Titus if it would be safe to take corn to DCC. Titus replied that he was planning on delivering some of his own corn to DCC. Wells inferred it was safe to do so himself and told Bob and Kudlacek that Titus would deliver corn to DCC in August 2000. All three testified they relied on this statement in delivering corn to DCC that fall. Wells AG Enterprises, BJW Farms, EWW Farms, Inc., and Dwayne Kudlacek lost a total of $171,702.19 in corn in DCC's bankruptcy.

Titus's August 2000 statement to Gary Wells cannot be the basis for these plaintiffs' tort claims because it was a statement of present intent, and there is no evidence that Titus, who personally fed bison at DCC that year, misrepresented his intention. Nor did that statement require the disclosure of what

Titus knew as DCC's former loan officer in order to make it not misleading. None of the Wells plaintiffs relied on any other representations by the Bank when they did business with DCC in late 2000. Accordingly, they failed to prove that they would not have entered into the loss-causing transactions in the absence of a false representation or non-disclosure by the Bank. *See Luscher v. Empkey,* 206 Neb. 572, 293 N.W.2d 866, 868 (1980). The district court erred in denying the Bank's motion for judgment as a matter of law on their tort claims.

The remaining plaintiffs did not rely on alleged misrepresentations or nondisclosures by the Bank in 2000, the year they entered into the corn and cattle transactions with DCC that caused them pecuniary loss in DCC's bankruptcy.

Dixon Granstra and DG Farms, Inc. Dixon Granstra and DG Farms, Inc., operate out of Sheldon, Iowa. Neither has ever been a customer of the Bank. Granstra began feeding cattle with DCC in the late 1980s and fed millions of dollars worth of cattle at the feedlot before 2001. In 1999, Damrow told Granstra that he had "taken a position" on eighty loads of cattle on the Chicago Mercantile Exchange. Concerned at the magnitude of this risk, Granstra asked his Iowa banker, Jerry Adams, to inquire of the Bank whether Damrow could handle the risk. Adams called loan officer Sterr who said that DCC was a "good customer," "excellent quality," and "sound." After talking with Adams, Granstra testified that he decided to continue doing business with DCC. In July

2000, Granstra and DG Farms Inc., purchased lots of cattle at DCC.[9] They incurred substantial losses in the DCC bankruptcy, including a $297,000 settlement with the DCC trustee for an alleged preference payment to Granstra in December 2000.

Granstra and DG Farms, Inc., rest their tort claims on what loan officer Sterr told banker Adams in 1999. Plaintiffs contend there was ample evidence that Sterr knew of negative financial and credit issues at DCC.[10] Therefore, he was guilty of at least negligent misrepresentation when he gave false or incomplete information to Adams. However, the Granstra plaintiffs cannot recover because no reasonable person would expect Sterr's statements in mid-1999 to influence cattle investors the following year.

Plaintiffs' expert, Dr. Jones, testified to the volatility of this market, where prices fluctuate significantly within a matter of months. Jones testified that financial information about a cattle feeding operation can become unreliable even during a single four-five month cattle feeding cycle. Thus, in this investment market, there is a rather short limit on

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[9] Granstra did not testify that he specifically relied upon information from the Bank when he purchased lots of cattle with Damrow in 2000.

[10] As loan officer for the Damrow and Carter entities from 1994 until he left the Bank in late 1999, Sterr received a daily loan report that alerted him to overdrafts, also tracked past-due DFF notes, and analyzed the negative internal report in 1997 of multiple problems and possible abuses with the Damrow credits.

the period of time in which a banker making a general statement that a feedlot customer is a "safe place to do business" or is "sound" or is an "excellent credit" would intend or expect that statement to influence an inquiring third-party contemplating cattle or corn transactions with the feedlot. Whether or not the banker expects that the bank will participate in the third party's transactions, his misrepresentation or non-disclosure, whether fraudulent or merely negligent, does not have the requisite relationship to the third party's much later, loss-causing transaction to be tortious, particularly a transaction occurring after the bank is no longer financing the customer. *See* Restatement (Second) of Torts, §§ 531, 551(2)(e), 552(2)(b). Although the relevant time period will often be a question of fact for the jury, no reasonable jury could find that Sterr's statement in mid-1999 was intended to influence or could be expected to influence the Granstra plaintiffs' cattle purchases in late 2000. Accordingly, the district court erred when it denied the Bank's motion for judgment as a matter of law on the tort claims of Granstra and DG Farms, Inc.

Don Sjogren. Don Sjogren owns and operates two farms adjacent to the DCC feedlot; he fed cattle and delivered corn from the day it opened. Sjogren also was a customer of the Bank until 2001. In June 1999, a DCC check written by Damrow to Sjogren for a pen of cattle was rejected by the Bank and mailed to Sjogren with an n.s.f. notice. Concerned, Sjogren asked Bank president Riley if anything was wrong

with DCC. Riley left the room to inquire, then returned and told Sjogren it was a clerical error and that DCC was a good place to do business. Sjogren testified he bought two pens of cattle in 1999 after hearing Riley's assurance. He did not testify that Riley's June 1999 assurance led him to purchase cattle and store grain at DCC in the fall of 2000. Sjogren lost $312,411.50 in cattle, $39,404.70 in corn, and $16,707.25 in attorney's fees as a result of his 2000 transactions with DCC.

Although the jury reasonably found that Riley's statement to Sjogren was fraudulent or at least negligent,[11] Sjogren's loss-causing transactions with DCC were too remote in time from Riley's June 1999 statement to give rise to actionable claims for misrepresentation or non-disclosure. Without a false statement more closely related to the transactions with DCC that caused Sjogren's damages, and absent any testimony that Sjogren relied upon Riley's statement when he entered into the loss-causing transactions, he cannot recover for the Bank's misrepresentation. Therefore, like the Granstra plaintiffs, the district

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[11] Riley made that statement even though DCC was assigned the Bank's second highest risk rating for most of 1999 and had been placed on the Bank's watch list just a day earlier. Had Sjogren lost money on the cattle he bought in 1999 relying on Riley's misrepresentation and non-disclosure of the true reason for the n.s.f. check, the Bank would have been liable for that loss. *See Gibb*, 518 N.W.2d at 921. But, according to expert Jones, 1999 was a profitable year to feed cattle.

court erred when it denied the Bank's motion for judgment as a matter of law on Sjogren's tort claims.

Theodore Collin. Collin was employed by the Bank as a loan officer and vice president from 1983 until January 2000, when he left to work at another bank in Holdrege. Collin began delivering corn and feeding cattle at DCC in 1993. In the fall of 2000, Collin delivered corn and bought cattle at DCC. He lost $22,501.59 in cattle, $27,766.16 in corn and spent $1,216.00 in attorney's fees as a result of these transactions in DCC's bankruptcy.

Collin's claims fail as a matter of law. As a member of the Bank's loan committee from 1990 through early 1998, Collin was aware of DCC overdrafts and past-due DFF notes. Slominski and Sterr explained that the Bank used the overdrafts to limit DCC spending, and the past-due notes were cattle feeder timing issues. Collin testified that he expected Sterr to advise if there were any financial concerns with DCC. But neither Collin nor any other witness testified that the Bank ever supplied Collin false information for the purpose of influencing his DCC investments. Instead, he claimed that Slominski and Sterr misled him during loan committee meetings. The Bank's knowledge that Collin was also a DCC investor does not transform information shared during loan committee meetings into business guidance for purposes of a fraudulent or negligent misrepresentation claim.

Without evidence the Bank supplied information to guide or influence Collin's personal transactions, he cannot maintain an action for negligent misrepresentation. *See Farr v. Designer Phosphate & Premix Int'l, Inc.*, 253 Neb. 201, 570 N.W.2d 320, 326 (1997) (§ 552 requires "that one supplying the misrepresentation must *intend* to supply the information and that such person must *intend* that the information will induce reliance and influence the transaction") (emphasis in original). Nor did Collin present evidence giving rise to a duty to disclose under § 551(2) after he began working for a competing bank and the Bank terminated its relationship with DCC.

Collin's claim of fraudulent misrepresentation required proof that he reasonably relied on knowingly false representations by Slominski and Sterr at the loan committee meetings. In addition to the timing issue that is fatal to the Granstra and Sjogren claims, the independent information available and known to Collin compels the conclusion that he could not have reasonably relied on the loan committee statements when he did business with DCC in the fall of 2000. After leaving the Bank in early 2000, Collin did a comprehensive analysis of DCC and DFF for his new employer and personally inspected cattle at the feedlot. With this information in hand, no reasonable jury could find that Collin instead relied on statements made in loan committee meetings from years earlier when he decided to do business with DCC in the fall of 2000. *See generally Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176, 181-83 (1996). The district

court erred when it denied the Bank's motion for judgment as a matter of law on Collin's tort claims.

Dave Dahlgren and Dahlgren's, Inc. Dave Dahlgren and his family's corporation began delivering corn and feeding cattle at the DCC feedlot in the early 1980s. Both were also customers of the Bank until March 2000. Every February from 1995 through 1999, during a review conducted by Dahlgren's loan officer, Ted Collin, Dahlgren would ask if it was a good idea to continue doing business with DCC. Collin replied to each inquiry, in substance, "Well, you know, I wouldn't be doing business there if I didn't think it was okay also." Dahlgren testified that he relied on Collin's statements when he delivered corn to DCC in the fall of 2000, and purchased cattle on November 9, 2000. Dahlgren and Dahlgren's Inc., incurred substantial losses on these transactions in the DCC bankruptcy.

At trial, Dahlgren did not testify that co-plaintiff Collin, his only source of DCC financial information at the Bank, ever conveyed a fraudulent representation about DCC's financial condition or dealings with the Bank. For this reason, as well as the timing issue discussed above, the Dahlgren plaintiffs' tort claims fail as a matter of law. Without evidence that Collin made statements of fact either knowing they were false, or recklessly ignoring their truth or falsity, the Dahlgren plaintiffs cannot sustain their fraudulent misrepresentation claims against the Bank. *See Four R Cattle Co.*, 570 N.W.2d at 816-17. Nor can Slominski's and Sterr's statements made to Collin at loan

committee meetings support the Dahlgren plaintiffs' fraud claims absent evidence these Bank officers intended that Dahlgren and his corporation, as well as Collin, would rely on them. The fraudulent concealment and negligent misrepresentation claims falter on the specific nature of Collin's annual reassurance, "I wouldn't be doing business there if I didn't think it was okay also." These were statements of personal opinion and present intent that did not, without a more specific inquiry from Dahlgren related to particular transactions he was contemplating, impose a duty to disclose the details of a customer's financial affairs known to Collin as a loan officer of the Bank. For all these reasons, the district court erred when it denied the Bank's motion for judgment as a matter of law on the Dahlgren plaintiffs' tort claims.

IV. An Evidentiary Issue

Over the Bank's timely objection, the district court allowed FNBO and Adams Bank & Trust witnesses to testify that those banks sued the Bank for withholding information about DCC and that the Bank settled those claims, but not the amount of the settlements. The Bank argues that the district court abused its discretion in allowing plaintiffs to elicit this testimony. The Bank relies on Federal Rule of Evidence 408 which provides in relevant part:

> Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a

> claim that was disputed as to validity or amount . . . furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim.

Plaintiffs respond – quite correctly – that Rule 408 as written only applies to evidence of compromise offered to prove liability for or the amount of the claim that was compromised, whereas here evidence that the Bank settled claims by its successor lenders was offered to refute the Bank's claim that it was not liable for *plaintiffs'* tort claims. This textual limitation has led our sister circuits to differ somewhat on whether Rule 408 applies to evidence of compromises or offers to compromise claims by third parties. *Compare Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688-90 (7th Cir.2005), and cases cited, with *Hudspeth v. Commissioner,* 914 F.2d 1207, 1213-14 (9th Cir.1990), and the cases cited in *Lo Bosco v. Kure Eng'g Ltd.*, 891 F.Supp. 1035, 1037-39 (D.N.J.1995). We have not examined the issue in depth, but our decision in *Vulcan Hart Corp. v. NLRB,* 718 F.2d 269, 276-77 (8th Cir.1983), though distinguishable, viewed the scope of Rule 408 narrowly.

As Judge Learned Hand explained years ago, the admission of evidence that a defendant settled a claim with a third party arising out of the same set of operative facts carries the inherent risk that "such a concession of liability is almost sure to be taken as an

admission of fault." *Paster v. Pennsylvania R.R.*, 43 F.2d 908, 911 (2d Cir.1930). For this reason, even the circuits that construe Rule 408 narrowly view evidence of third party settlements skeptically. As the Tenth Circuit explained in *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir.1997), "Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated, though admission of such evidence may nonetheless implicate the same concerns of prejudice and deterrence of settlements which underlie Rule 408" (internal citations omitted). We agree.

We review the district court's evidentiary rulings for abuse of its substantial discretion, reversing only if we conclude there was a prejudicial abuse of that discretion that affected the Bank's substantial rights. *See Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 294-96 (8th Cir.1995); Fed.R.Civ.P. 61. The Bank argues that it was prejudiced because the settlement evidence undermined its claim at trial that DCC was a satisfactory credit risk in early 2000, when FNBO and Adams Bank took over the credit. However, even absent the evidence of settlement, this claim would have been undermined by the admissible testimony of FNBO and Adams Bank witnesses that the Bank failed to disclose negative information about DCC and that the successor banks had sued the Bank for their losses in the DCC bankruptcy. The district court took steps to avoid unfair prejudice by excluding the amounts of the settlements and the settlement documents, and counsel for plaintiffs did not refer to the

settlements during closing argument. Finally, and perhaps most importantly, the issue is now limited to the fraud claims of plaintiffs Erickson, Erickson Land and Cattle, Nelson, and Skane, Inc., claims we have affirmed because the Bank made negligent misrepresentations about DCC's financial condition after DCC was no longer a customer. In these circumstances, the admission of limited settlement evidence was not a clear and prejudicial abuse of discretion.

V. Conclusion

For the foregoing reasons, the judgment of the district court is affirmed in part and reversed in part. The award of treble damages to each plaintiff and $1,095,263.00 in attorneys' fees under RICO is reversed. The awards of tort damages to Dave Dahlgren; Dahlgren's, Inc.; Theodore Collin; Dixon Granstra d/b/a Granstra Cattle; DG Farms, Inc.; Wells Ag Enterprises, Inc.; Don Sjogren; BJW Farms, Inc.; EWW Farms, Inc. and Dwayne Kudlacek are also reversed, and all claims of these plaintiffs are dismissed. The awards of tort damages to Lloyd Erickson ($66,393.58); Erickson Land and Cattle ($96,220.28); Skane, Inc. ($172,863.67); and Clark Nelson ($22,638.56) are affirmed.

2007 WL 397009 (D.Neb.)

United States District Court, D. Nebraska.
Dave **DAHLGREN**, et al., Plaintiffs,
v.
FIRST NATIONAL BANK OF HOLDREGE, Defendant.
No. 8:05CV15.

Feb. 1, 2007.

Jeanelle R. Lust, Rodney M. Confer, Trev E. Peterson, Knudsen, Berkheimer Law Firm, Lincoln, NE, for Plaintiffs.

James J. Niemeier, Matthew W. Lytle, Robert J. Bothe, Terry A. White, William F. Hargens, McGrath, North Law Firm, Omaha, NE, for Defendant.

James M. Davis, Davis Law Offices, Justin W. High, Sodoro, Daly Law Firm, Omaha, NE, for Interested Party.

MEMORANDUM AND ORDER

RICHARD G. KOPF, United States District Judge.

On December 15, 2006, a jury returned a verdict in favor of Plaintiffs on their RICO Act and state-law claims in the total amount of $1,897,770.95. The matter is now before the court on Plaintiffs' motions for treble

damages (filing 391) and attorney fees (filings 393, 396)[1] under the RICO Act, 18 U.S.C. § 1964(c).

Treble Damages

Defendant objects to the entry of any judgment in favor of Plaintiffs, but does not dispute Plaintiffs' entitlement to treble damages under the RICO Act upon the entry of a judgment in favor of Plaintiffs. Nor does Defendant dispute the accuracy of Plaintiffs' calculations of treble damages, as attached to the motion.

Plaintiffs' motion for treble damages will be granted, and judgment will be entered in accordance with the discrete amounts calculated by Plaintiffs. The total amount of the RICO Act treble damages is $5,693,312.73.

Attorney Fees

Both sides agree that it is appropriate in this case to use the "lodestar" method to determine reasonable attorney fees under the federal statute. I concur. *See C.I.R. v. Banks*, 543 U.S. 426, 438 (2005) (in the federal system statutory fees are typically

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[1] Plaintiffs filed an amended motion for attorney fees that increased the amount claimed as taxable costs. Costs are taxable by the clerk of the court pursuant to Fed.R.Civ.P. 54(d)(1) and 28 U.S.C. § 1920, and thus will not be considered by me in conjunction with the attorney fee award issue. I note that Plaintiffs have also filed a bill of costs (filing 397) pursuant to NECivR 54.1 for consideration by the clerk.

awarded by the court under the lodestar approach and the plaintiff usually has little control over the amount awarded); *Gisbrecht v. Barnhart,* 535 U.S. 789, 802 (2002) (lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation).

The lodestar is equal to "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The onus is on the party seeking the award to provide evidence of the hours worked and the rate claimed. *Wheeler v. Missouri Highway & Transp. Com'n,* 348 F.3d 744, 754 (8th Cir.2003). Where the documentation of hours is inadequate, or the hours are excessive, redundant, or otherwise unnecessary, the district court may reduce the award accordingly. *See Hensley,* 461 U.S. at 433-34. As a general rule, a reasonable hourly rate is the prevailing market rate, that is, "the ordinary rate for similar work in the community where the case has been litigated." *Moysis v. DTG Datanet,* 278 F.3d 819, 828 (8th Cir.2002) (quoting *Emery v. Hunt,* 272 F.3d 1042, 1047 (8th Cir.2001)). There is a strong presumption that the lodestar represents the reasonable fee, and a fee applicant who seeks more has the burden of showing that an adjustment is necessary. *See City of Burlington v. Dague,* 505 U.S. 557, 562 (1992).

In this case, Plaintiffs' lodestar calculation is $1,400,816.60. This represents 7,705.20 billable hours of work at a blended rate of $181.80 per hour

(rounded to the nearest cent), including the services of nine attorneys, five secretary/paralegals, and two student law clerks at the Knudsen Berkheimer law firm. Plaintiffs do not seek any enhancement of this lodestar calculation.

Almost three-fourths of Plaintiffs' $1.4 million fee request pertains to work performed by their two trial attorneys, Rod Confer ($444,075.00)[2] and Jeanelle Lust ($593,450.00).[3] The next largest portion of the fee is attributable to the work of a secretary/paralegal, Tammy Schroeder ($230,380.00).[4] Defendant objects to the number of hours claimed for all three of these timekeepers, and to the hourly rates claimed for Mr. Confer and Ms. Lust. Defendant has also filed a lodestar calculation, totaling $953,704.05, that differs from Plaintiffs' calculation in other minor ways. In general, I agree with Defendant's arguments and the authorities cited in its brief.

I first consider whether the hourly rates claimed are reasonable. Plaintiffs' lodestar calculation uses a rate of $310.00 per hour for Mr. Confer and a rate of $275.00 per hour for Ms. Lust. Plaintiffs have filed supporting affidavits from two Omaha attorneys, David Domina and Michael Degan, both of whom opine that the hourly rates claimed for Mr. Confer and Ms. Lust are fair and reasonable. Defendant has

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[2] Calculated as 1,432.5 hrs. x $310.00/hr. = $444,075.00.

[3] Calculated as 2,158.0 hrs. x $275.00/hr. = $593,450.00.

[4] Calculated as 2,303.8 hrs. x $100.00/hr. = $230,380.00

filed an opposing affidavit from a Lincoln lawyer (and a former partner in the Knudsen Berkheimer law firm), Terry Dougherty, who opines that in this case a fair and reasonable rate for Mr. Confer to charge would be from $250.00 to $265.00 per hour, and for Ms. Lust would be from $200.00 to $225.00 per hour. Mr. Dougherty also states that rates customarily charged by attorneys in Lincoln for complex civil litigation are between $200.00 and $265.00 per hour for partners, such as Mr. Confer and Ms. Lust, and between $135.00 and $165.00 per hour for associates.[5]

When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates. *Hanig v. Lee,* 415 F.3d 822, 825 (8th Cir.2005). Hourly rates allowed in comparable cases may also be considered. *See Moysis v. DTG Datanet,* 278 F.3d 819, 828 (8th Cir.2002).

To my knowledge, the hourly rates sought by Plaintiffs are excessive when compared to prevailing rates in Lincoln, or in Omaha, or in greater Nebraska. This is generally borne out by a survey of Westlaw-reported decisions from this court over the past several years involving attorney fee awards. *See Local 22 Intern. Broth. of Elec. Workers v. Sadler Elec., Inc.,* No. 8:05CV523, 2006 WL 3511324, *4

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[5] Mr. Confer's and Ms. Lust's customary charges are not in evidence. Their law firm has 40% contingency fee contracts with Plaintiffs in this case.

(D.Neb. Dec. 5, 2006) (Smith Camp, J.) (in ERISA case, blended hourly rate of $180 was reasonable for a litigation team of two attorneys in a Kansas City law firm where one had 23 years experience in labor and employment law and the other was a first-year associate); *Comcast of Illinois X v. Multi-Vision Electronics, Inc.,* No. 8:03CV311, 2006 WL 2805259, *2 (D.Neb. Sept. 28, 2006) (Bataillon, J.) (in Cable Communications Act case, hourly attorney fees of $125, $175, and $250 were reasonable); *Wilson v. Life Ins. Co. of North America,* No. 4:05CV3133, 2006 WL 1700281, *1 (D. Neb. June 15,2006) (Kopf, J.) (in ERISA case, hourly rates of $175 for a law firm partner and $125 for an associate were reasonable and, according to affidavits filed by two knowledgeable Lincoln attorneys, conformed to the average rates charged in Lincoln); *Ollis v. Hearthstone Homes, Inc.,* No. 8:05CV119, 2006 WL 1700077, *8 (D. Neb. June 12, 2006) (Smith Camp, J.) (in employment discrimination case, hourly rates customarily charged for litigation by Omaha law firm, of $200 for attorney with 39 years' experience and $175 for less experienced attorney, were reasonable); *New Hope Fellowship, Inc. v. City of Omaha,* No. 8:04CV259, 2006 WL 1479030, *3-4 (D.Neb. May 17, 2006) (Dawson, J.) (in Fair Housing Act case, hourly rates claimed by a leading Omaha law firm were reduced from $150 to $125 for an associate with less than 3 years' experience, from $160 to $125 for an associate with 4 years' experience, from $280 to $250 for a partner and former Nebraska Supreme Court Justice, from $265 to $250 for another partner who had practiced

employment discrimination law for 16 years, and from $100 to $50 for paralegal services; however, a $300 hourly rate for a partner with specialized experience in litigating FHA cases across the United States was reasonable, considering efficient handling of this case); *Diehm v. City of Omaha,* No. 8:04CV130, 2006 WL 753192, *2 (D.Neb. March 22, 2006) (Bataillon, J.) (in First Amendment employment discrimination case, hourly rate of $175 for partner in Omaha law firm with 16 years' experience in labor and employment law was a reasonable and customary charge for his services); *Rockwell v. Talbott, Adams & Moore, Inc.,* No. 8:04CV24, 2006 WL 436041, *1 (D.Neb. Feb. 21, 2006) (in Fair Debt Collection Practices Act case, hourly rates between $115 and $145 charged by attorney with 5 years' experience were reasonable); *Shiller v. Sarpy County,* No. 8:03CV365, 2005 WL 3032516, *3-4 (D.Neb. Nov. 11, 2005) (Smith Camp, J.) (in employment discrimination case, hourly rate of $175 charged by law firm partner with 8 years' experience in labor and employment law was reasonable); *Reed v. Shenandoah Memorial Hosp.,* No. 8:01 CV435, 2002 WL 1964826, *4 (D.Neb. Aug. 12, 2002) (Bataillon, J.) (in ERISA case, hourly rates of $50 for law clerks and paralegals and $105 to $160 for attorneys charged by Omaha law firm were reasonable); *ACLU Nebraska Foundation v. City of Plattsmouth,* 199 F.Supp.2d 964, 968 (D.Neb. 2002) (Kopf, J.) (in First Amendment case, hourly rates of $120 and $125 for two attorneys, and $50 for a paralegal, were reasonable); *U & I Sanitation v. City of Columbus,* 112 F.Supp.2d 902, 904-05 (D.Neb.2000) (in non-jury

constitutional (commerce clause) case, reasonable hourly rate for experienced lead counsel was $125, not the requested rate of $150); *Ross v. Douglas County,* No. 8:98CV530, 2000 WL 33678952, *3 (D.Neb. June 5, 2000) (Shanahan, J.) (in public employment discrimination case, hourly rate of $175 for plaintiff's counsel was consistent with the prevailing rates for attorneys in civil rights cases in Omaha); *Milone v. Exclusive Healthcare, Inc.,* No. 8:98CV274, 2000 WL 351741, *3 (D.Neb. March 9, 2000) (Bataillon, J.) (in ERISA case, attorney's billed rate of $95 per hour was reasonable for Omaha).

Defendant proposes that the lodestar be calculated using an hourly rate of $265.00 for Mr. Confer and an hourly rate of $225.00 for Ms. Lust. Because I find that rates set any higher than these figures would not be reasonable, I will adopt Defendant's proposal without further analysis or comment.

I next examine a redundancy in the number of billable hours that were devoted to depositions by Mr. Confer and Ms. Lust. It appears that both attorneys attended all depositions that were taken in this case. Defendant calculates that Mr. Confer spent 447.15 hours preparing for, traveling to and from, and attending depositions, and that Ms. Lust devoted 487.8 hours to these very same tasks. Defendant proposes a 25% reduction in the number of deposition-related hours for each attorney, which would eliminate some, but not all, of the redundant billing. I find this to be a very reasonable proposal, and will adopt it.

I also find merit in Defendant's objection that Plaintiffs' lodestar calculation includes billable hours that were related only to state-law claims, for which attorney fees are not recoverable. Defendant proposes that Plaintiffs be ordered to segregate these billable hours or else suffer a 20% reduction in the number of billable hours claimed for Mr. Confer, Ms. Lust, and Ms. Schroeder. Plaintiffs, while protesting that the state-law claims were "inextricably intertwined" with the RICO Act claim, have now calculated that $76,128.00 of the attorney fee sought is "state law related" (filing 405). Because I conclude that some adjustment is appropriate, I will use Plaintiff's dollar figure (which represents about 5% of the total fee requested).

Finally, I note that Defendant's lodestar calculation differs from Plaintiffs' calculation in certain other respects, but, because Defendant has not discussed these differences in its brief, I will not attempt to rationalize them on my own. In any event, the total dollar amount involved (about $10,000.00) is comparatively small.

In summary, I will accept Plaintiff's lodestar calculation with the following modifications: (1) Mr. Confer's total billable hours will be reduced to 1,320.71,[6] and his hourly rate will be reduced to $265.00. As a result, his fee will be reduced from $444,075.00 to $349,998.15, a difference of $94,086.85.

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[6] Calculated as 1,432.5-(447.15 x.25) = 1,320.71.

(2) Ms. Lust's total billable hours will be reduced to 2,036.05,[7] and her hourly rate will be reduced to $225.00. As a result, her fee will be reduced from $593,450.00 to $458,111.25, a difference of $135,338.75. (3) The total fee will be reduced by $76,128.00 to account for time spent on state-law claims. With these three reductions, which total $305,553.60, the lodestar figure becomes $1,095,263.00.[8] I will award this amount.

Accordingly,

IT IS ORDERED that:

1. Plaintiffs' motion for treble damages (filing 391) is granted with respect to the RICO Act claim.

2. Plaintiffs' motion and amended motion for attorney fees and costs (filings 393, 396) are granted in part and denied in part, as follows:

    a. Plaintiffs are awarded attorney fees of $1,095,263.00 related to the RICO Act claim.

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[7] Calculated as 2,158.0-(487.8 x.25) = 2,036.05.

[8] Calculated as $1,400,816.60-$305,553.60 = $1,095,263.00.

b. In all other respects the motion is denied, but without prejudice to the clerk ruling on Plaintiffs' bill of costs (filing 397).

3. Final judgment shall be entered by separate document.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVE DAHLGREN, et al.,	)	8:05CV15
Plaintiffs,	)	**ORDER**
vs.	)	(Filed Apr. 11, 2007)
FIRST NATIONAL BANK OF HOLDREGE,	)	
Defendant.	)	

IT IS ORDERED that:

1. Plaintiffs' supplemental motion for attorney fees (filing 419) is granted,[1] and Plaintiffs are awarded an additional sum of $42,514.00 for attorney fees associated with their previous fee application and responding to Defendant's post-trial motions.

2. An amended judgment shall be entered by separate document.

April 11, 2007. BY THE COURT:

/s/ *Richard G. Kopf*
United States District Judge

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[1] Plaintiffs' supplemental motion was filed and served on March 23, 2007. Defendant has not responded to the motion, which is now ripe for decision. *See* NECivR 7.1 ("A brief opposing any other motion [than a motion for summary judgment or motion to dismiss] must be filed and served no later than ten (10) business days after the motion and supporting brief are filed and served.").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVE DAHLGREN, et al., Plaintiffs, vs. FIRST NATIONAL BANK OF HOLDREGE, Defendant.	)	8:05CV15 **AMENDED JUDGMENT** (Filed Apr. 11, 2007)

Pursuant to the Verdict of the jury, the court's Memorandum and Order filed on February 1, 2007, and the court's Order filed on this date,

FINAL JUDGMENT is entered for Plaintiffs, Dave Dahlgren, Dahlgren's, Inc., Theodore Collin, Lloyd Erickson, Erickson Land and Cattle, Dixon Gangstra d/b/a Gangstra Cattle, DG Farms, Inc., Skane, Inc., Clark Nelson, Wells Ag Enterprises, Inc., Don Sjogren, BJW Farms, Inc., EWW Farms, Inc., and Dwayne Kudlacek, and against Defendant, First National Bank of Holdrege, in the total amount of $1,897,770.95 for Plaintiffs' state-law claims and in the total (trebled) amount of $5,693,312.73 for Plaintiffs' RICO Act claims,[1] plus attorney fees in the total amount of $1,095,263.00 for Plaintiffs' RICO Act claims, together with a supplemental award of attorney fees in the total amount of $42,514.00 for post-trial motions, the taxable costs of the action in

[1] Plaintiffs shall have only one recovery for both claims.

the total amount of $20,111.32, and post-judgment interest as provided by law.

The amount of damages recoverable by each Plaintiff is as follows:

Plaintiff	State-law claim	RICO Act claim
Dave Dahlgren	$55,085.50	$165,256.50
Dahlgren's, Inc.	$89,906.90	$269,720.70
Theodore Collin	$51,483.75	$154,451.25
Lloyd Erickson	$66,393.58	$199,180.74
Erickson Land and Cattle	$96,220.28	$288,660.84
Dixon Granstra d/b/a Granstra Cattle	$694,342.43	$2,083,027.29
DG Farms, Inc.	$108,610.60	$325,831.80
Skane, Inc.	$172,863.67	$518,591.01
Clark Nelson	$22,638.56	$67,915.68
Wells Ag Enterprises, Inc.	$94,790.79	$284,372.37
Don Sjogren	$368,523.45	$1,105,570.35
BJW Farms, Inc.	$44,734.36	$134,203.08
EWW Farms, Inc.	$2,872.45	$8,617.35
Dwayne Kudlacek	$29,304.59	$87,913.77
Total	$1,897,770.95	$5,693,312.73

April 11, 2007. BY THE COURT:

/s/ *Richard G. Kopf*
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1951

Dave Dahlgren, et al.,

Appellees

v.

First National Bank of Holdrege,

Appellant

Appeal from District of Nebraska – Omaha
(8:05-cv-00015-RGK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 22, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans